TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 103

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

T. J. WYNNE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED JULY 22, 1909.

(21,769.)

(21,769.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 284.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

T. J. WYNNE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print
Transcript from Desha circuit court	1	1
Title and style of cause	1	1
Complaint at law	2	1
Statement as to summons and service	4	2
Answer	5	3
Judgment	7	3
Order filing and overruling motion for new trial, granting appeal and time to file bill of exceptions	9	4
Bill of exceptions	10	5
Evidence for plaintiff	11	5
Testimony of T. J. Wynne	12	5
Joe Smith	19	9
John Warren	26	13
T. J. Wynne (recalled)	30	15
R. E. Wiley	31	15
Notice referred to in testimony	32	16
Plaintiff rests	34	18
Evidence for defendant	34	18
Testimony of Will McDonald	35	18
Alex Jenkins	40	21
W. H. Gantt	43	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1910.

	Original.	Print
Defendant rests	46	25
Complaint	47	25
Evidence closed	49	26
Stenographer's certificate	50	26
Charge to jury	51	27
Plaintiff's requests for instructions	52	27
Verdict	53	28
Motion for judgment, &c	54	28
Response to motion for judgment, &c	55	29
Motion for judgment, &c., granted	57	30
Motion for new trial	57	30
Motion for new trial overruled	59	31
Time granted to prepare bill of exceptions	59	31
Judge's certificate to bill of exceptions	59	32
Supersedeas bond	60	32
Bill of costs	61	33
Clerk's certificate	62	33
Order of submission	63	33
Judgment (first)	64	34
Order filing petition for rehearing	65	34
Order setting aside judgment	65	34
Order granting time to file briefs	66	35
Order of submission on rehearing	66	35
Order denying rehearing, &c	67	35
Final judgment	68	35
Opinion by McCulloch, C. J.	69	36
Motion for rehearing	71½	38
Clerk's certificate to transcript	72	39
Petition for writ of error	73	40
Assignment of errors	73	40
Order granting writ of error	75	41
Writ of error	76	41
Clerk's certificate as to writ-of-error papers	78	42
Bond on writ of error	79	42
Citation and service	81	44
Return to writ of error	82	44
Statement of costs	82	45

1 No. 811. Blue 16. #593.

Sup. Ct. Docket.

TRANSCRIPT FROM DESHA CIRCUIT COURT TO SUPREME COURT, ARKANSAS.

Pleas.

Before the Honorable Antonio B. Grace, Judge of the Desha Circuit Court, on the Sixteenth Day of July, 1908.

Title and Style of Cause.

T. J. WYNNE, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Action for Damages.

Endorsed: Transcript. Filed November 21, 1908. P. D. English, Clerk, by W. P. Sadler, D. C.

Comes the Defendant and prays an appeal to the Supreme Court.

T. M. MEHAFFY &
J. E. WILLIAMS,
Attorneys for St. L., I. M. & So. Ry. Co.

Appeal Granted Nov. 21, 1908.
P. D. ENGLISH, *Clerk,*
By W. P. SADLER, *D. C.*

2 Desha Circuit Court.

T. J. WYNNE, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Complaint at Law.

Complaint.

Comes plaintiff, by his attorneys, Wiley & Clayton, and for his cause of action states:

Defendant is a corporation organized and acting under the laws of the State of Arkansas, and operates a railroad in said State and through the county of Desha in said State.

On or about July 31st, 1907, defendant negligently and carelessly ran one of its railroad trains against and over two of plaintiff's horses and killed them, at or near the station of Lear, which is a station on defendant's railroad in the county of Desha and State of Arkansas, and said horses were then and there in said county of Desha killed by being struck by a railroad train running in said county, by reason of the negligence of the employees of said defendant t-en and there running said train.

On or about the 2d day of August, 1907, thereafter, plaintiff served notice on defendant of the killing of said horses, by delivering to the station agent of defendant at Dumas, in the State of Arkansas, a written notice of said killing, giving the date and place of killing, the description of the animals killed, and the train doing the killing, which was a passenger train northbound, and all other information called for by the defendant's blank for- for making claims for
3 damages for killing stock, upon which blank form plaintiff's report of said killing was made out; afterwards also plaintiff further gave notice to defendant of said killing by letter, containing full information of the facts aforesaid, which was, by plaintiff, addressed to the assistant claim agent at Little Rock; the name of said agent being unknown, the letter was addressed to "Assistant Claim Agent of the St. Louis, Iron Mountain & Southern Railway Company, Little Rock, Ark.," and was stamped with postage prepaid and mailed by plaintiff prior to January 23d, 1908, and defendant has failed and refused to pay any part of said damages.

By the killing of said animals, as aforesaid, plaintiff has been damaged in the sum of Four Hundred Dollars, for which sum and all his costs and to all other relief to which he is by law entitled, plaintiff prays judgment.

WILEY & CLAYTON,
Attorneys for Plaintiff.

T. J. Wynne, on oath, says the matters and things set out in the foregoing complaint are true.

T. J. WYNNE.

Subscribed and sworn to before me this 15th day of June, 1908, in county of Jefferson, State of Arkansas.

G. W. DAVIS, *J. P.*

Filed and Summons issued June 18th, 1908.

W. E. MEEKS, *Clk.*

Pd. 2.50.

4 *Statement as to Summons.*

Summons issued June 18th, 1908.
Summons served June 19th, 1908.

5 In the Desha Circuit Court.

T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Answer.

Comes the defendant, and for answer to the complaint herein denies that it did on or about July 31, 1907, or at any other time negligently and carelessly run one of its railroad trains against and over two of plaintiff's horses as alleged in the complaint; it denies that it killed said horses, or either of them; it denies that they were killed by reason of any negligence or carelessness on the part of the defendant or any of its employees;; it denies that plaintiff served notice on it of the killing of said horses as alleged in the complaint, or that he has ever notified it of the same; it denies that the plaintiff has been damaged in the sum of Four Hundred Dollars.

Further answering, defendant states that plaintiff maintained his stable where he kept said horses besides the railroad track of the defendant, and that he permitted said horese to run at large with full knowledge that they would graze along defendant's track over which trains were continually passing, and that the train was due at the time plaintiff turned them out; that in so doing plaintiff was negligent and that his negligence contributed directly to the loss of which he complains; and defendant pleads said contributory negligence of the plaintiff in this action.

Wherefore having fully answered, defendant prays to be
6 dismissed from this action with its costs.

BRIDGES, WOOLDRIDGE & GANTT,
Attorneys for Defendant.

Filed in open court, July 15th, 1908.

W. E. MEEKS, *Clk.*

7 T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Judgment — Circuit Court.

Judgment.

On this 16th day of July this cause being reached on the calendar is regularly called for trial and comes the plaintiff in person and by his attorney R. E. Wiley and the defendant by its attorneys, Bridges, Wooldridge & Gantt, and both parties announce ready for trial and comes a lawful jury of twelve good and true men, citizens of Desha

County regularly selected and empannelled from the regular panel of the petit jury in attendance upon this term of this court and are sworn according to law to try the issues between the parties to this action, and after hearing the testimony of the witnesses and evidence introduced by both parties, the instructions of the court and the arguments of counsel for both parties, they retire to consider their verdict and after due deliberation they return into Court the following verdicts general and special, to-wit:

General Verdict: "We, the jury, find for the plaintiff and assess his damages at Four Hundred and Twenty-three Dollars ($423).
W. A. CHESHIRE, *Foreman.*

And also a Special Verdict as follows:

In answer to the question: Did the plaintiff serve notice on the defendant Railroad Company of the killing of the stock sued for and of his claim for damages for same more than thirty days before bringing suit for said damages? The jury answers, "Yes."
In answer to the question what was the fair market value at Lea of the horses in controversy at the time they were killed the jury answers: "Four Hundred Dollars."
(Signed) W. A. CHESHIRE, *Foreman.*

8 Now, therefore, on motion of the plaintiff for judgment on verdict it is considered, ordered, and adjudged by the court that plaintiff T. J. Wynne have and recover of and from the defendant Saint Louis, Iron Mountain & Southern Railway Company, the sum of Eight Hundred and Twenty Three Dollars for his damages, *and all his costs in this action, and the further sum of Fifty Dollars* which the Court now finds to be a reasonable attorney's fee for the services rendered plaintiff in this case, and that plaintiff have execution therefor.

Attorney's Fee.

9 T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Motion for New Trial Filed.

On this day motion for new trial filed.

T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

On this day motion for new trial filed, which is overruled and exceptions noted, appeal granted and ninety days allowed to file Bill of Exceptions.

10 In the Desha Circuit Court, July Term, 1908.

T. J. WYNNE, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that on July sixteenth, 1908, being a day of the July Term, 1908, of the Desha Circuit Court, before the Honorable A. B. Grace, the regular judge thereof, and a jury, the above entitled cause came on for trial, and in the course thereof evidence was introduced, objections made and exceptions taken, and other proceedings had, which are as follows, to-wit:

11 *Testimony of —— ——.*

The Plaintiff, to sustain the issues on his behalf, introduced the following witnesses and testimony, to-wit:

12 *Testimony — T. J. Wynne.*

T. J. WYNNE, the plaintiff, being produced and sworn, testified as follows:

Direct examination:

Q. What is your name?
A. T. J. Wynne.
Q. Where do you live?
A. I live now at Lear.
Q. Where were you living July, last year?
A. Lear.
Q. Is that in Desha County?
A. Yes sir.
Q. What were you doing there?
A. Logging business then—hauling logs.
Q. Were you the owner of some horses that got killed about that time?
A. Yes sir.
Q. What kind of horses were they?
A. One was a roan and one a bay horse.
Q. What was their size?
A. One was about sixteen hands high and the other sixteen and a half.
Q. How long did you own those horses?
A. About eighteen months or two years.
Q. What was their condition as to being sound or healthy?
A. They were sound and wealthy.

Q. Did those horses get killed, and if so tell what you know about it?

A. They got killed.

Q. When?

A. On the evening of the 31st of July, 1907.

13 Q. What time?

A. About seven o'clock.

Q. Where did they get killed?

A. At Lear.

Q. What killed them?

A. Passenger train going north.

Q. Passenger train of the St. Louis, Iron Mountain & Southern Railway Company?

A. Yes sir.

Q. Describe what you saw of the accident which killed your horses?

A. Well, the train was coming up about seven o'clock and I heard an alarm given—a stock alarm—and I looked out and seen the horses some two hundred feet, or probably more, from the train.

Q. Did you see them killed?

A. No sir, I didn't exactly see them, because there was a little house right in front of me and naturally I could not see the horses at the time the train struck them.

Q. Did you see the horses after they were killed?

A. Yes sir.

Q. How soon?

A. Well, I would say in less than five minutes.

Q. How long have you been handling horses, Mr. Wynne?

A. Well, I have been handling horses all my life, but I have not been handling log horses except for four or five years.

Q. Have you bought and sold horses used for logging purposes?

A. Not to a considerable extent—I bought and handled for other people as well as for myself a few times.

Q. What were those horses used for by you?

A. For logging purposes.

14 Q. How long had you used them for that purpose?

A. About two years.

Q. All the time you owned them?

A. Yes sir.

Q. State whether or not they were good at that?

A. Yes sir, they were as well a trained log team as a man ever seen in this country—they were so well trained that they would move a log two inches at a word.

Q. You know what the market value of those horses were at the time and place where they were killed?

A. Yes sir, I think I do.

Q. What do you consider the market value of those horses?

A. I consider them worth Five Hunderd Dollars a pair.

Q. You mean you consider this pair of horses worth Five Hundred Dollars?

A. Yes sir.

Q. Have you ever been paid any part of the value of those horses?
A. I have not.
Q. State whether or not you served notice on the railroad company of the killing of these horses, and if so in what way?
A. I did.
Q. How?
A. On the blank form the company sends out for that purpose.

Here counsel for plaintiff called upon counsel for the defendant to produce the notice referred to above, whereupon defendant's counsel, in open court, produced from a file of papers in his possession a notice which is hereinafter copied in full into this bill of exceptions at page 24 of this bill.

Q. State whether or not that (handing witness the notice
15 produced as aforesaid by the counsel for the defendant), is the form you filled out for that purpose?
A. It is.
Q. How did you get that to the railroad company?
A. I sent it to them.
Q. To whom did you send it?
A. Mr. Coffey, the station agent at Dumas.

At this point in the proceedings plaintiff offered in evidence the form referred to above, which is numbered "form 702½ Rev.," to the introduction of which the defendant objected on the ground of its being immaterial. The court announced that for the present he would sustain the objection of the defendant.

Cross-examination:

Q. What time of night was it, Mr. Yynne, that you saw this train coming along?
A. About seven o'clock in the evening.
Q. How long had you owned these horses?
A. About two years.
Q. They were getting right old were they not?
A. No sir.
Q. They were not old?
A. No sir, I didn't consider them old—they were about eleven years old.
Q. The road was crippled, wasn't it?
A. No sir.

Redirect examination:

Q. This place where the accident happened was in Desha county, wasn't it?
16 A. Yes sir.
Q. How much did you pay for those horses?
A. Four Hundred and Fifty Dollars.
Q. When?
A. About June, 1905, I think it was.

Q. Now, you say you paid Four Hundred and Fifty Dollars for them and you value them at Five Hundred Dollars, why have you sued for Four Hundred Dollars only?

Objected to by counsel for defendant, which objection was by the court overruled.

A. I had a notice of a settlement at that figure——

Objected to by counsel for the defendant, whereupon the court announced that if the purpose of the question was to bring out evidence concerning a compromise he would sustain the objection of the defendant.

By COURT:

Q. You say you saw those horses about two hundred feet ahead of the passenger train, where were they at that time?

A. They was on the side of the track.

Q. On the track?

A. No sir, not on the track—yes sir, they were on the track.

Q. Were they by the side of the track or on the track?

A. There was a gray horse among them and he was on the side of the track.

Q. Did you see your two?

A. Well, I had four.

Q. Did you see these two that were hurt at the time?

A. No sir, I didn't see them at the time.

Q. You saw some other horses and the gray horse?

17 A. Yes sir.

Q. How long after the train passed was it before you saw the horses that you are now suing about?

A. About five minutes, maybe less time.

Q. Where were they with relation to the place where you saw these other horses just before that?

A. Some fifty feet, I guess. There was a house in the way.

Q. When you found them where were they?

A. Laying on the side of the track.

Q. On the right-of-way?

A. Yes sir.

Q. Were they both on one side of the track or on opposite sides from each other?

A. One on one side and one on the other.

Q. Were they alive?

A. No sir, they were both dead at the time I reached them.

Q. Describe what injuries, if any, you found upon them—what evidence that they had been injured by external violence?

A. One had his neck broke.

Q. How did you find that out?

A. By taking hold of his head.

Q. What was the matter with the other?

A. He was just bruised all over—he was struck on the body—had bruises on the body.

Q. Was the skin broken?

A. No sir, just bruised.
Q. Any bones broken that you could discover?
A. Not that I know of.
Q. How close to the rails were they lying?
A. One was lying about ten feet and the other one, I suppose, about fifteen feet.
18 Q. Any ditch there?
A. Yes sir.
Q. Were they nearer the road than the ditch or across the ditch from the road?
A. They were between the road-bed and the ditch.
Q. About what was the weight of those horses?
A. One weighed about fourteen and fifty or fifteen hundred and the other about fifteen hundred or sixteen hundred.
Q. Any difference in the value of them?
A. No sir.
Q. Any difference in their ages?
A. No sir.
Q. About the same age and same value?
A. Yes sir.

Redirect examination:

Q. Mr. Wynne, you know how wide the right-of-way was there?
A. No sir, I don't know how wide it was there.

By COURT:

Q. Was it fenced in?
A. No sir.

19 *Testimony — Joe Smith.*

JOE SMITH, a witness for the plaintiff, being produced and sworn, testified as follows:

Direct examination:

Q. Your name and residence, please, Mr. Smith?
A. Joe Smith is my name, I live at Lear, Arkansas.
Q. You know T. J. Wynne, the plaintiff in this case?
A. Yes sir.
Q. Did you know the two horses which Mr. Wynne owned and which were killed about the third of July, last year?
A. Yes sir.
Q. How long had you known them?
A. Oh, six or eight months—five or six, somewhere along there between five and eight months.
Q. What were those horses for?
A. Logging.
Q. What experience and observation, if any, have you had with regard to the value of horses used for that purpose or any other purpose?

A. I own some—I have bought some and sold some.
Q. What business were you in there?
A. I was logging.
Q. Were you engaged in that same business before that?
A. Yes sir, I was.
Q. Are you acquainted with the market value of horses there at Lear at that time—horses such as these?
A. I bought two or three teams at Pine Bluff that spring; never bought but one at Lear.
Q. You consider that you know what horses such as these were worth at Lear?
A. I think I do.
20 Q. What did you consider these two horses worth at Lear?
A. As far as I know they were logging there and were a team that would pull the loads—I saw them pull and what I saw of them they were worth somewhere about Four Hundred and Fifty Dollars.

Cross-examination:

Q. You say you saw these horses work?
A. Yes sir.
Q. You base your opinion upon that?
A. Yes sir, and as horses. I never examined those horses closely about their age and I am not able to say because I never had any occasion to—I saw Mr. Wynne hauling there with them.
Q. You don't know whether they were old horses or not?
A. I could not say about the age.
Q. The age would effect the price to some extent, would it not?
A. Yes, but from their action I don't think they were old, but I am not positive about that.
Q. About what age would a horse have to be to be old in that kind of work?
A. That depends a great deal upon how the horse has been cared for—some of them are knocked out quite young and I have had horses not hurt at eighteen.
Q. Logging is a very heavy kind of work isn't it?
A. Yes sir, pretty heavy.
Q. Hard on horses to do that kind of work, isn't it?
A. Well, that depends upon the way the team is taken care of—I have had teams to hold out for seven or eight years and that's about as long as they will hold out on a farm.
Q. Seven or eight years of work then is about the life of a horse ordinarily?
A. Yes sir.
21 Q. When they have worked for that length of time they are pretty near done for?
A. Not exactly, but they are on the down hill after that time.
Q. Their price would decrease very rapidly after they reached that age, would they not?
A. Not necessarily, no.
Q. If they became worthless it would, would it not?

A. They might be good at eighteen.
Q. You didn't see these horses killed, did you?
A. I didn't see the train hit them, no sir.

Redirect examination:

Q. For the purpose of logging, for which these horses were used, what effect does increased age have on the training of the horses?
A. A whole lot—a well trained horse is worth a great deal more than a green team for that purpose.
Q. Do they get better trained as they get older?
A. As a rule, yes. They get better trained and take care of themselves better—they are not so bad to skin themselves and things of that kind.
Q. Supposing these horses to be eleven years of age and in the condition as you knew them there at that time, what is your judgment as to their value?
A. About what I said.
Q. Where were you at the time the horses were killed?
A. Well, I was in my house, I think. At least, I was near—I heard the whistle sounding.
Q. Did you hear the stock alarm whistle?
A. Yes sir.

22 By COURT:

Q. How far did you live from where these horses were killed?
A. About a half a quarter, Judge.
Q. About two hundred and twenty yards?
A. Yes sir, somewhere along there.
Q. Did you see them after they were killed?
A. Yes sir.
Q. How long after the killing?
A. I suppose twenty minutes, or something like that.
Q. Did you put your hands on them or examine them to see what injuries were inflicted upon them?
A. They were dead and I looked at the carcass lying inside the track.
Q. Lying right opposite the track?
A. Yes sir, one on one side and one on the other.
Q. Did you see them before they were killed?
A. Yes sir.
Q. How long before?
A. Not a great while. I was coming off of the farm and went right by and saw the horses rolling just as they were turned out, on some sawdust. I put my horse in the barn and fed him and was sitting down at the supper table when I heard the whistle blow.
Q. About how long was that before you heard the stock alarm?
A. Between fifteen and forty-five minutes.
Q. Where were these horses when you saw them rolling, that you speak of?
A. Out on the side of the road about one hundred yards from the road.

Q. Near the camp or house of the plaintiff?
A. Yes sir, right in front of it.
Q. Did he have a camp or house there?
23 A. Camp.
Q. Stockade?
A. Yes, therhe was a corral/ with barbed wire around it.
Q. It was outside of that and near his camp that you saw them rolling?
A. I ain't positive whether it was outside or inside.
Q. But you noticed these same horses there within an hour before the killing, close to his camp?
A. Yes sir, right at it.
Q. You lived about the same distance from him that you did from the railroad?
A. No, I lived within seventy-five feet of the railroad and the horses were killed near or almost directly in front of his corral/.
Q. About how far was that away from the railroad track—his camp—where these horses were kept?
A. About seventy-five yards, I judge—not over seventy-five.
Q. Was his camp in timber or in a field?
A. Partially cleared up—it has once been fenced up. It is an old mill yard.
Q. Not enclosed now—that is, wasn't at that time, except the corral/?
A. No sir, that's all.
Q. You didn't put your hand on this stock when you saw them—simply saw them lying by the side of the track there, dead?
A. Yes sir.
Q. You were not looking at the train when it passed?
A. I saw the train pass my house.
Q. Didn't see it strike the stock?
A. No sir.
24 Q. Is there any station close to that place?
A. Yes sir.
Q. How far away?
A. About a half a quarter.
Q. Was the train going into the station or coming out of it?
A. Going into Lear .
Q. Did they stop at Lear?
A. Yes sir.
Q. Did you hear them whistle for Lear?
A. I heard them whistle for the stock alarm—I would not be positive about the other.
Q. They were going toward the station then, at the time you heard the stock alarm?
A. The train stops right in front of my house.
Q. It must have come to your house right after it struck the stock, then?
A. Yes sir.
Q. And your house is between where the stock was killed and Lear?

A. Yes sir—No sir, Lear is between my house and where the stock was killed. The engine and baggage car stops right in front of my house and those stock were killed about a half a quarter south, this way, from Lear. The train was a northbound train.

Redirect examination:

Q. Was there any train due at Lear at that time of day?
A. This train was late—it ought to have been at Lear somewhere between three and four o'clock.
Q. What time was this?
A. I judge about seven in the evening.
Q. Was there any train due there at that time of day?
25 A. No regular train, I think not.

Cross-examination:

Q. You refer to passenger trains, don't you?
A. Yes sir, it was a passenger train that killed the stock—I don't think there was any other train due there.
Q. You don't know the scheduled time of the through freight trains, do you?
A. I don't think it is customary for a train to pass at that time.
Q. The through freights passed there at irregular hours, didn't they?
A. There were freights passed frequently, yes.
Q. Quite a number of trains pass that town, don't they?
A. Yes. I don't know how many, several.

26 *Testimony — John Warren.*

JOHN WARREN, a witness for the plaintiff, being produced and sworn, testified as follows:

Direct examination:

Q. Your name and residence, please?
A. John R. Warren.
Q. You live at Lear, in this county?
A. Yes sir, I am staying there—saw-milling there.
Q. You know Mr. T. J. Wynne, the plaintiff in this case?
A. Yes sir.
Q. Were you there at Lear last year in July when Mr. Wynne had some horses killed by the railroad company?
A. Yes sir.
Q. Did you know those horses?
A. Yes sir.
Q. How long have you known them?
A. I don't know just how long—ever since he had been there.
Q. Had you known them ever since he came there?
A. Yes sir.
Q. Do you know the market value of those horses at the time and place where they were killed?

A. Well, I have been buying horses and mules there and bought some at Little Rock—I bought some horses along about that time.

Q. Well, do you consider that you know what the market value of such horses was at Lear, from your knowledge, experience and observation?

A. Well, I expect about two hundred dollars apiece.

Q. State whether or not you had seen the horses in use?

A. Oh, yes—they hauled logs for us right along.

Q. Were the horses trained?

A. Yes sir, they were good trained horses—good log horses.

27 Q. Do you know the age of the horses?

A. No, I don't know their exact age.

Q. Supposing those horses to be eleven years old and in the condition you knew them to be there——

A. That's somewhere about the age of the horses, I would think, from the appearance of the horses.

Q. You think the two were worth Four Hundred Dollars?

A. Yes sir.

Cross-examination:

Q. Mr. Warren, wouldn't a horse eleven years old be getting rather old to do logging work?

A. No sir, that's a good age—we don't want young horses to do logging with.

Q. Well, if they have been logging until they are eleven years old their usefulness is about over, isn't it?

A. If he is mistreated he is killed at a young age, but if he is treated well the horse is all right at that age.

Q. You think these horses were worth about Two Hundred Dollars?

A. Yes sir, somewhere near that.

Q. You didn't see them killed, did you?

A. No, I was in the stable and someone run out and said they killed a horse. I went down and seen the horses next morning and had our teams to haul them off the railroad. The railroad company said they would pay us for them and never did it.

Q. Who said that?

A. The section man. I have hauled off three or four for him, but he has never paid me for it.

Q. How far were they from Lear?

A. Well, they were about—that is according to where you would call Lear—it was about three hundred yards from our store.

28 Q. Which side of Lear?

A. Kind of south—down this way.

Q. On this side of Lear?

A. Yes sir.

Q. Did you examine the injuries to the horses?

A. No, I never examined them.

Q. Just had them hauled off?

A. Yes sir, one laid on one side of the track and the other the other.

Q. About how far from the track?
A. Just out of the way of the cars, I guess.

Redirect examination:

Q. Mr. Warren, was there any train due at Lear at that time of day?
A. Well, trains at Lear have been coming at any time—no certain time, it seems like. Since I have been there the trains have been running very irregular—sometimes the passenger is four or five hours late.
Q. Do you know the scheduled time of the northbound passenger train passing Lear?
A. It has been changed several times, but it is right close to four o'clock in the evening.
Q. What was it at that time?
A. Just about dusk or dark—might say dark. I think the headlight on the engine was lit.
Q. It was lighted, was it?
A. Yes sir.
Q. Do you know what hour it was?
A. No, I don't know exactly what hour it was—I expect it was about between seven and eight somewhere. You know about
29 when dark would come in July—it was the last of July somewheres, I think.

Recross-examination:

Q. That passenger got there about that time most every day then, didn't it?
A. No, it varied considerably.

30 T. J. WYNNE, the plaintiff, being recalled for further examination, testified as follows:

Direct examination:

Q. This notice, which you have already identified as being the one on which you prepared the claim, on what day did you send that to the company?
A. On the second day of August, 1907.

No cross-examination.

31 *Tetimony — R. E. Wiley.*

R. E. WILEY, a witness for the plaintiff, being produced and sworn, testified as follows:

GENTLEMEN OF THE JURY:

About the twenty-third of January, 1908, while I was at Hamburg, in Ashley county, attending circuit court, I saw Mr. F. L. Young, who was the Assistant Claim Agent of the Iron Mountain Railroad at that time, located at Little Rock, who then and there had

in charge the investigation of this claim of Mr. Wynne, and at that time I saw in his possession this notice.

Thereupon, counsel for the plaintiff read to the jury the notice above referred to, which is in words and figures as follows, and which is the same notice produced by defendant's counsel in court during the examination as a witness of T. J. Wynne, in this case and by that witness identified as the notice prepared by him, to-wit:

32 *Notice Referred to by T. J. Wynne.*

Form 702½. Rev.

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Railway Co., and Leased, Operated, and Independent Lines

To ..... Dr.
(Here insert full and correct name of owner.)

For following animals killed or injured by the locomotives and cars of said Railway Company on its tracks:

Date of accident.			Description.					
Day.	Month.	Year.	Kind of animal.	Age.	Weight.	Color.	Marks or brand.	Actual cash value.
31	July	1907.	Draft horse.	10	1400	Bay..	.....	$250.00
31	"	1907.	Draft horse.	10	1500	Roan.	.....	250.00

Read this Carefully.

It is the desire of this company to pay the reasonable cash value of all stock killed and make reasonable and fair allowance for stock injured on its track, where a just meritorious claim exists. In order that the company may give these matters prompt attention and fair consideration, it is important that you answer the questions on this blank, which are not deemed improper, to assist in making a prompt and satisfactory investigation.

All claims made out on this blank by the owner will receive precedence over claims which are not so made out. Forward this statement when complete to the Assistant Claim Agent in charge of your jurisdiction, or hand it to any Station Agent on the Railway Company, who will promptly forward it to proper Department for attention. Owners are requested to save as much of the animals killed or injured as possible; by so doing they will not prejudice their claim against the Company and will save themselves, as well as the Company, unnecessary loss.

If Stock Was Struck at Different Times Fill Out One Blank for Each Case.

Interrogatories.

1. Was animal killed or injured? (If alive describe injuries.)
Ans. Killed.
2. Between what stations was stock struck?
Ans. Readville and Lear.
3. Between what mile posts was stock struck?
Ans. 422 and 421.
4. Was stock struck inside limits of a town? (If so, name the same.)
Ans. No.
5. Was stock struck between switches of a station? (If so, name the same.)
Ans. End of spur.
6. Was road fenced at point where animal came on track?
Ans. No.
7. What kind of fence? (State whether rail, wire, board, etc.)
Ans. Non-.
8. Was stock struck on public crossing?
Ans. No.
9. Did animal enter right-of-way at private crossing?
Ans. No.
10. At what hour of day or night was animal struck?
Ans. 7 evening.
11. From whom did you first learn that stock was killed or injured? (Give full particulars.)
Ans. My *nolej.*
12. Who saw stock struck? (Give name and address.)
Ans. Mr. McDonnel.
13. Was animal struck by train?
Ans. Yes.
14. Was it a freight or passenger train? (State direction going, n. e., s. or w.)
Ans. Pas*hinj*er.
15. Was whistle sounded or any other alarm given? (State fully.)
Ans. Yes.
16. How far from stock was whistle sounded or bell rung?
Ans. Ri*te* on them—on 50.
17. How much did you realize from sale of animal? (Meat or hide.)
Ans. None.
18. Who had charge of stock when struck?
Ans. Myself.
19. How and where did animal get on trac*t*?
Ans. —.
20. From whom and how long ago did you purchase animal?
Ans. J. M. Moses.

21. How much did you pay for it?
Ans. 450.
22. Was there any lien or mortgage on this stock?
Ans. No.
23. If any lien or mortgage, by whom held? (Give name and address.)
Ans. —.
24. How far do you live from station? (Name station and direction, north, south, east or west.)
Ans. At station.
25. Where can you be found by Company's representative? (Give full directions.)
Ans. At Rotan.
26. State fully any other facts?
Ans. —.

33 27. Are your answers to the foregoing from your own knowledge or from information obtained from others?
Ans. My own.
28. If obtained from others give name and address of such persons.
Ans. —.
29. State by number the questions above you have answered from information obtained from others?
Ans. —.
My full name is T. J. Wynne. (Here insert your full name.)
My post office address is Rotan, County of Desha, State of Ark.
Certified to by me as a true and correct statement this 2 day of August, 1907.

(Sign-) T. J. WYNNE.
(Owner sign full name here.)

Witnesses:
JOE SMITH.
JOHN R. WARREN.
T. S. FRITZ.

34 The endorsements on back of the foregoing form were not read to the jury by direction of the court.

Plaintiff rests.

The defendant, to sustain the issues on its behalf, introduced the following witnesses and testimony, to-wit:

35 *For Defendant, Testimony — Will McDonald.*

WILL MCDONALD, a witness for the defendant, being produced and sworn, testified as follows:

Direct examination:

Q. What is your name?
A. Will McDonald.

Q. Where do you live?

A. Lear.

Q. Mr. T. W. Wynne has sued the railroad company for the value of two horses which he claims a train belonging to the railroad company killed last July, do you know anything about the killing of those horses?

A. Yes sir.

Q. Now, tell the jury whether or not you saw the killing?

A. Yes sir, I seen it.

Q. How far were you away from the point on the railroad track where they were killed at that time?

A. I reckon I might have been about forty or fifty feet—I was at his camp in front of the railroad.

Q. When did you first notice the approach of the train?

A. When I heard it blow—it blowed for the horses and I happened to see the light flash down the track and they was on the side of the railroad in the ditch eating when I first seen them.

Q. What did they do after the whistle sounded?

A. The- got afraid of it and ran up on the railroad in a path like and they finally ran up on top of the track and they didn't get very far until the train overtaken them.

Q. Which direction were they going?

A. North.

Q. Towards the station of Lear?

36 A. Yes sir.

Q. How far were they in front of the train at the time they went up on the track?

A. It seemed to be about the length of two telegraph poles—when they jumped up on the track—they ran a good ways on the side of the track before they got on the track.

Q. About how far would two telegraph poles be?

A. I don't know, sir, exactly.

Q. How fast was that train running at that time?

A. It seemed to be doing pretty good running then—it kind of shut off a little for Lear, but it didn't seem to check much—after it hit the horses it slowed up a little.

Q. After it struck the horses it slowed up at the crossing and then they had to pull forward again to get to the station?

A. Yes sir.

Q. Did you see the horses after they were struck?

A. Yes sir, they were right in front of my door.

Q. How were they laying with reference to the railroad?

A. One head was turned north from the railroad, he went to jump; and the other one, it caught him as he went to look around and threw him back on the side-track and doubled him up on his head. It looked like the roan went to jump and just as he started to jump it hit him and pitched him across the railroad in a ditch like.

Q. How far away?

A. Fifteen or sixteen feet, I guess, on the other side of the ditch from the railroad—from the end of the ties.

Cross-examination:

Q. Don't you know about how far it is between telegraph poles?
A. Never heard—some say one hundred and fifty yards—I don't know what it is—I never got the straight of the thing yet. I
37 don't know exactly how far it is—it might be two hundred yards or something like that.
Q. You mean yards or feet?
A. Feet. I don't know how far it is.
Q. Do you mean to say that that stock, when they went on the track, were the distance of two telegraph poles in front of the train?
A. Yes sir, they ran a pretty good way before they got on the track.
Q. You were looking at them?
A. Yes sir.
Q. After the- went on the track did the engine check up—try to stop?
A. It seemed to slow just a little bit and then it pulled right out.
Q. I mean after the stock went on the track?
A. No sir, it didn't seem to slow up until it run into them and after it struck them it slowed up at the crossing just a little.
Q. Did they strike the stock before they got to the crossing?
A. Yes sir.
Q. And you say they slowed up at the crossing?
A. Yes sir.
Q. The engine didn't slow up until after the horses got on the track?
A. No sir.
Q. Have you seen trains going that fast stopped in the distance that train was from the horses after they got on the track?
A. Yes sir, I have worked on the railroad some and I have seen trains stopped that quick. They can stop them pretty quick.

Redirect examination:

Q. You mean to say you have seen a train stopped in the
38 distance of two telegraph poles running at that rate of speed?
A. Yes sir, I was working at Pine Bluff on the work train.
Q. How many cars had they?
A. A caboose and two water tanks.
Q. What sort of a train was it that killed these horses?
A. Passenger train.
Q. You know how many passenger coaches it had?
A. No sir, I don't.

By COURT:

Q. You say that the horses had run for a considerable distance alongside of the track before they went up on it and the engine was whistling at them, giving the stock alarm?
A. Yes sir.
Q. Now, when they went up on the track do you mean to say that

they were as far from the engine as it is from one telegraph pole to the other or the length of two poles ahead?

A. Two poles.

Q. You mean as *har* ahead — to the second pole—from one to two and from two to three—and the third one?

A. No sir, not the third one.

Q. Did you mean to say that they went on the track about as far ahead of the engine as from one telegraph pole to the other, or from one to the second one—you mean only the distance from one pole to the other?

A. Yes sir.

Q. Then about how far did they run along the track before they were struck, after they went on the track?

A. I don't know, sir, exactly, but they went a pretty good piece before they got on top of the track.

Q. How far did they run after they got on top of the track?

39 A. About two telegraph posts.

Q. Do you mean the distance from one to the second one beyond or from one to another?

A. From one to another.

Q. When you say two panels of fence you don't mean from one post to the other, do you?

A. No sir.

40 *Testimony — Alex Jenkins.*

ALEX JENKINS, a witness for the defendant, being produced and sworn, testified as follows:

Direct examination:

Q. What is your name?

A. Alex Jenkins.

Q. Where do you live?

A. At Lear.

Q. Did you see some horses belonging to T. J. Wynne killed by a railroad train the thirty-first of last July?

A. Yes sir.

Q. Where were you at the time?

A. At the tent.

Q. Where is the tent with reference to the railroad track?

A. Sitting right in front of the railroad.

Q. Where were these horses when you first noticed them?

A. When I first seen them they was right on the railroad.

Q. How far away was the train?

A. Just about the length of a telegraph post, as near as I can come at it.

Q. About how fast was that train running?

A. I don't know what rate it was making a mile, but it was running pretty fast.

Q. What did it do, if anything?

A. It blowed.
Q. What did the horses do then?
A. The horses just kept going on like they were.
Q. About how far did they go before they were struck?
A. I don't think they got very far before the train overtaken them.
Q. Only a short distance?
41 A. Yes sir.
Q. How were they thrown?
A. One on one side and one on the other.
Q. Did the train stop after that?
A. No sir, not until it got to the depot.
Q. About how far was that?
A. It was a pretty good piece from there.

Cross-examination:

Q. After you saw the horses on the track and before they were struck, did engine- make any effort to stop or slow down before they struck the horses?
A. Yes sir, it looked to me like he cut down a little before he struck them.
Q. What do you mean by the length of a telegraph pole, you mean the distance between two telegraph poles?
A. Yes sir.
Q. You know how far that is?
A. No sir, I don't—never measured it.
Q. Now, the horses when you first saw them were on the track and about the distance between two telegraph poles in front of tne engine?
A. Yes sir
Q. How far did they run along there before the engine overtook them?
A. Not very far.
Q. You think it was the distance between two telegraph poles?
A. No sir, I don't think it was that far.
Q. Were you acquainted with those horses?
A. Yes sir, I drove them for three years right straight along.
Q. Do you know anything about the value of horses?
42 A. Yes sir, according to my ideas about it—but them horses I worked for so long until I know about what service they was and I guess that's the way you tell what they are worth.
Q. What do you know about their training and ability to work?
A. I trained them myself—they was about the best trained horses ever I seen.
Q. How well trained were they?
A. They was good haulers and good condition horses every way a man would wish to have a horse.
Q. Could you make them stop and start easily?
A. Yes sir.
Q. What were those horses worth there at Lear at that time?

A. Four Hundred Dollars—I think they were worth every bit of it, if not more.

Q. What would you have given for them?

Above question objected to by counsel for defendant which objection was sustained by the court.

43 *Testimony — W. H. Gantt.*

W. H. GANTT, a witness for the defendant, being produced and sworn, testified as follows:

Direct examination:

Q. What is your name?
A. W. H. Gantt.
Q. Where do you live?
A. Lear, Arkansas.
Q. Were you acquainted with two horses belonging to T. J. Wynne which are alleged to have been killed by a train at Lear July 31st, 1907?
A. Yes sir.
Q. How long had you known those horses?
A. About six months.
Q. What is your occupation at Lear?
A. Planting.
Q. Are you acquainted with the value of horses at Lear?
A. Well, I suppose so.
Q. What would you say those horses of Mr. Wynne's were worth at a fair market value at Lear at the time they were killed?
A. I suppose they were worth One Hundred and Fifty Dollars apiece.
Q. Do you know the age of those horses?
A. No sir.
Q. What condition were they in?
A. Well, they were in fair working order.
Q. Was either of them crippled?
A. I don't know sir.
Q. Were they of the same value, do you think?
A. I thought the wheel horse—the bay horse—was the better horse.

44 Q. Better than the roan?
A. Yes sir.

Q. You valued them though, at One Hundred and Fifty Dollars each?
A. Yes sir, I should think they were worth that much—they would not have been worth that much to a farmer, but to a logger they were, I suppose.
Q. Do you know where Mr. Wynne kept those horses?
A. In a stable, I think—in a little shed.
Q. You didn't see them killed, did you?
A. No sir.

Q. Do you know what Mr. Wynne's custom was with regard to those horses in the evening—what he did with them?
A. Well, I believed they were turned out after being fed.
Q. Did you ever see them turned out?
A. Yes sir, I have seen them on the railroad.
Q. How often do you think?
A. Well, several times.
Q. Was he in the habit of turning them out every evening?
A. I think so.
Q. Where did they go when they were turned out?
A. Usually around my gin there and across the track.
Q. How close to the track?
A. Frequently on the track—when the grass was tended up and down the track.
Q. They were accustomed to graze along the track?
A. Yes sir.

Cross-examination:

Q. Mr. Gantt, don't you know that Mr. Wynne kept these horses tied up at night in his stable?
A. No sir.
45 Q. Don't you know that all the turning out he ever did was just between the time he quit work and before he fed them, instead of after he fed them?
A. No sir, I don't. I don't know exactly when he fed them, of course, but I have seen them late in the evening on the track.
Q. And it's just supposition when he turned them out, before or after?
A. Yes sir, or when he fed them—of course, I thought he fed them before he turned them out—the other people do that.
Q. The other people around down there let their stock run out?
A. Yes sir.
Q. Mr. Wynne is not different there from his custom than other people?
A. Except myself—I never let my stock run out, but I think as a usual thing the loggers do—in fact, I know they do.
Q. You never used these horses?
A. No sir.
Q. Never observed how well trained they were or what age they were?
A. No sir.
Q. You are not in the logging business, are you?
A. No sir.
Q. You are acting in charge of the railroad company's depot and warehouse there, are you not?
A. To a certain extent I am—I built it for my use and I kept it locked up in order to take care of freight shipped there—to that extent I am acting for them, but I am not employed by them—don't get a salary out of it.
Q. You do act for them that far?
A. Yes sir.

46 Redirect examination:

Q. It is alleged that the afternoon passenger train killed this stock, do you know between what points that train runs?
A. Between Alexandria and Little Rock.
Q. In what States?
A. Louisiana and Arkansas.
Q. What character of train is it?
A. Passenger train.
Q. About how many cars does it carry?
A. I think it carries three and a baggage.
Q. And a sleeper?
A. Yes sir, and a sleeper.
Q. Do you know the distance between two telegraph poles?
A. About seventy yards.

Defendant rests.

Counsel for plaintiff here read to the jury and introduced in evidence plaintiff's complaint, which is in words and figures as follows, to-wit:

47 *Complaint Read as Evidence.*

Desha Circuit Court.

T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Complaint at Law.

Comes plaintiff, by his attorneys, Wiley & Clayton, and for cause of action states:

Defendant is a corporation organized and acting under the laws of the State of Arkansas, and operates a railroad in said State and through the county of Desha in said State.

On or about July 31st, 1907, defendant negligently and carelessly ran one of its railroad trains against and over two of plaintiff's horses and killed them, at or near the station of Lear, which is a station on defendant's railroad in the county of Desha and State of Arkansas, and said horses were then and there in said county of Desha killed by being struck by a railroad train running in said county, by reason of the negligence of the employees of said defendant then and there running said train.

On or about the 2d day of August, 1907, thereafter, plaintiff served notice on defendant of the killing of said horses, by delivering to the station agent of defendant at Dumas, in the State of Arkansas, a written notice of said killing, giving the date and place of killing, the description of the animals killed, and the train doing the

killing, which was a passenger train northbound, and all other information called for by the defendant's blank form for making claims for damages for killing stock, upon which blank for- plaintiff's report of said killing was made out; afterwards also plaintiff
48 further gave notice to defendant of said killing by letter, containing full information of the facts aforesaid, which was, by plaintiff, addressed to the assistant claim agent at Little Rock; the name of said agent being unknown, the letter was addressed to "Assistant Claim Agent of the St. Louis, Iron Mountain & Southern Railway Company, Little Rock, Ark.," and was stamped with postage prepaid and mailed by plaintiff prior to January 23d, 1908, and defendant has failed and refused to pay any part of said damages.

By the killing of said animals, as aforesaid, plaintiff has been damaged in the sum of Four Hundred Dollars, for which sum and all his costs and *to* all other relief to which he is by law entitled, plaintiff prays judgment.

WILEY & CLAYTON,
Attorneys for Plaintiff.

T. J. Wynne, on oath, says the matters and things set out in the foregoing complaint are true.

T. J. WYNNE.

Subscribed and sworn to before me this 15th day of June, 1908, in county of Jefferson, State of Arkansas.

G. W. DAVIS, *J. P.*

Filed and summons issued June 18th, 1908.

W. E. MEEKS, *Clk.*

Pd. 2.50.

49 *Evidence Closed.*

The above and foregoing was all of the evidence in the case.

50 *Certificate — Stenographer.*

STATE OF ARKANSAS,
County of Jefferson:

I, H. L. Sternberg, Official Stenographer of the Eleventh Judicial Circuit of Arkansas, do certify that the attached and foregoing pages of typewritten matter constitute a true and correct report of the testimony of the witnesses examined at the trial of the cause mentioned in the caption, the Honorable A. B. Grace, Judge of the Eleventh Judicial Circuit of Arkansas, presiding during all said proceedings.

In testimony whereof, I have hereunto set my official hand this first day of September, 1908.

H. L. STERNBERG,
Official Stenographer, Eleventh Judicial Circuit of Arkansas.

51 *Instructions.*

Thereupon, the court, of its own motion, instructed the jury as follows, to-wit:

1. If you find from the evidence that the plaintiff was the owner of two horses and that they were killed by a train operated by the defendant company, then, in the absence of other evidence, the law presumes that they were killed by reason of the negligence of defendant's servants engaged in operating said train, and plaintiff would be entitled to recover the value of his horses, unless you further find from the evidence that defendant's servants engaged in operating said train, or some one of them, was keeping a lookout for persons and property on its tracks and that the killing of said stock was an accident which could not have been prevented by the exercise of ordinary care and skill on the part of said employees, and as to this the burden of proof is on defendant.

2. It was the duty of the employees of defendant engaged in operating its train to use reasonable care and skill to avoid injuring the plaintiff's horses after they were discovered on the track, and if you find that plaintiff's horses were killed by defendant's engine and that the engineer or other servant of the company in charge of the engine discovered them on the track, and that he could have avoided killing them by the use of reasonable care and skill in slowing down or stopping his train, then you should find for the plaintiff for the value of the horses with interest from July thirty-first, 1907, up to this date, at the rate of six per cent per annum.

3. If you find for the plaintiff, your verdict should be in this form:

"We, the jury find for the plaintiff and assess his damages at — Dollars."

52 If you find for the defendant, your verdict should be in this form:

"We, the jury find for the defendant."

Request by Plaintiff.

Thereupon, the plaintiff made request for a written instruction to the jury, which is hereinafter set out, to-wit:

In addition to bringing in a general verdict on the merits of the case, in favor of the plaintiff or the defendant, the jury will answer "yes" or "no" the following question:

(*a*) Did the plaintiff serve notice on the defendant railroad company of the killing of the stock sued for, and of his claim for damages for same, more than thirty days before bringing suit for said damages?

The court gave plaintiff's requested written instruction, as above set out, but added to the same the following question:

(*b*) Also, the jury will answer: What was the fair market value at Lear of the horses in controversy at the time they were killed?

The court, thereupon, instructed the jury further, as follows:

4. Your special verdict should be as follows:

"In answer to the first question we, the jury, say — and in answer to the second question we, the jury find that the market value of the horses at Lear at the time of the killing was — Dollars."

The defendant, at the time, severally and separately objected and excepted to the instructions of the court above numbered, respectively, as 1 and 2.

53 Those of the above and foregoing instructions which are noted as having been given were all of the instructions which were given to the jury.

After the argument of counsel the jury retired to consider of their verdict, and, after being out a while returned into open court with the following as their verdict, to-wit:

Verdict.

We, the jury, find for the plaintiff and assess his damages at Four Hundred & Twenty Three Dollars (423.00).

W. A. CHESHIRE, *Foreman.*

In answer to the first question we, the jury, say yes, and in answer to the second question we, the jury, find that the market value of the horses at Lear at the time of the killing was Four Hundred Dollars.

W. A. CHESHIRE, *Foreman.*

Objections.

The defendant objected to the verdict of the jury upon the specific grounds enumerated in defendant's motion for a new trial, which is hereinafter fully set forth; but, the court received said verdict over defendant's objections and the jury were discharged from further consideration of the cause, and the defendant, at the time, duly excepted to such action of the court in receiving said verdict.

Thereupon, in due time, on July seventeenth 1908, being a day of the same term, the plaintiff filed his motion for judgment, which motion is in the following words and figures, to-wit:

54 *Motion for Judgment for Double Damages and Attorneys' Fee.*

Desha Circuit Court.

T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Motion for Judgment.

Comes plaintiff and moves the court to enter judgment in this case for double the amount of damages awarded him by the jury

trying this case, and for a reasonable attorneys' fee, in accordance with the provisions of the Act of the Arkansas Legislature of February 27, 1907, Act Number 61, and respectfully shows to the court:

That plaintiff, the owner of the stock killed, served notice on the defendant railway company of the killing of said stock and of his loss and claim for damages therefor more than thirty days prior to the institution of this action, and that said defendant failed and refused to pay any part of said loss and damage within thirty days after said notice was served, or at any time, and the jury trying this action awarded plaintiff the total sum for which he sued, all of which fully appears by the verdict of the jury heretofore returned in this case.

WILEY & CLAYTON,
Att'ys for Plaintiff.

Filed in open court July 17th, 1908.

W. E. MEEKS, *Clk.*

55 Thereupon, on the same day, July seventeenth, 1908, the defendant filed its reponse to plaintiff's motion for judgment, which response is in words and figures as follows, to-wit:

Response to Motion for Judgment for Double Damages & Att'ys' Fee.

In the Desha Circuit Court.

T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Response to Motion for Judgment.

Comes the defendant, and in response to the motion for judgment on the verdict in this cause, states:

That the plaintiff is not entitled to judgment for double the amount of the damages awarded him by the jury, or his attorneys' fees, for the following reasons:

1. Because Act sixty-one of the Acts of 1907 of the Legislature of the State of Arkansas, under which act double damages and attorney fees are claimed, is unconstitutional, because it is in conflict with and contrary to section three of article two of the Constitution of the State of Arkansas, in that it denies to defendant equal protection before the law.

2. Because said act is unconstitutional, because it is contrary to and in conflict with section twenty-one of article two of the Constitution of the State of Arkansas.

3. Because said act is unconstitutional, because it is contrary to and in conflict with section seven of article two of the Constitution of the State of Arkansas, in that it denies to defendant the right to trial by jury.

4. Because it is contrary to and in conflict with section one of article fourteen of the amendments to the Constitution of the
56 United States, in that it deprives the defendant of its property without due process of law.

5. Because it is contrary to and in conflict with section one of article fourteen of the amendments to the Constitution of the United States, because it denies to defendant the equal protection of the laws.

6. Because the penalty imposed for failure to pay within thirty days after notice is served, such penalty being an amount equal to the damages awarded by the jury and as attorneys' fee, is so excessive as to deny to defendant the right of making defense to claims of such nature.

7. Because said act is unreasonable, and does not allow sufficient time to investigate and pay claims, and defendant cannot, within thirty days, inform itself sufficiently to be able to know whether or not it is liable, and cannot prepare vouchers for payment in so short a time.

8. Because said act is contrary to and in conflict with section eight of article two of the Constitution of the State of Arkansas.

9. Because said act is contrary to and in conflict with section six of article twelve of the Constitution of the State of Arkansas.

Wherefore, defendant states that judgment should not be entered upon said verdict for double the amount of the damages awarded by the jury, and for attorneys' fees.

BRIDGES, WOOLDRIDGE & GANTT,
Attorneys for Defendant.

Filed in open court July 17th, 1908.

W. E. MEEKS, *Cl'k.*

57 *Double Damages & Att'ys' Fee Allowed.*

After hearing the argument of counsel on the plaintiff's motion for judgment, the court, over the defendant's objections, sustained the plaintiff's motion and entered judgment for double the amount of damages, exclusive of interest, awarded by the jury, and for an additional Fifty Dollars as a reasonable attorneys' fee, to which action of the court the defendant, at the time, duly saved its exceptions separately and severally.

Thereafter, in due time, on July twentieth 1908, being a day of the same term, the defendant filed its motion for a new trial herein, which is in the following words and figures, to-wit:

Motion for New Trial.

In the Desha Circuit Court.

T. J. WYNNE, Plaintiff,
versus
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Motion for New Trial.

Comes the defendant, St. Louis, Iron Mountain & Southern Railway Company, and prays that the court will make an order setting aside the verdict and judgment in this cause and granting it a new trial, for the following reasons:

1. Because the verdict is contrary to the law.
2. Because the verdict is contrary to the evidence.
3. Because the verdict is contrary to the law and the evidence.
4. Because the court erred in giving, over the objection of the defendant, the first instruction given by the court.
5. Because the court erred in giving, over the objection of the defendant, the second instruction given by the court.

58 6. Because the court erred in sustaining, over the objection of the defendant, the motion of plaintiff to enter judgment on the verdict for double the amount of damages awarded by the jury and for an attorney's fee.

7. Because the court erred in rendering judgment for double the amount of damages awarded by the jury.
8. Because the court erred in rendering judgment for an attornee's fee.

Wherefore, defendant prays that the judgment be set aside and that it may be granted a new trial.

BRIDGES, WOOLDRIDGE & GANTT,
Attorneys for Defendant.

Filed in open court July 20th, 1908.

W. E. MEEKS, *Clk.*

59 *Mo. for New Trial Overruled.*

Thereafter, on the same day, said motion for a new trial was presented to the court and the court overruled the same and refused to set aside the verdict and judgment and grant defendant a new trial, to which ruling order and action of the court defendant at the time, duly excepted, which exceptions were noted of record.

Time Granted.

Thereupon, defendant was granted 90 days' time from the above mentioned date (July 20th, 1908) within which to file its Bill of

Exceptions herein, which shall be taken as a part of the record of this cause, and prayed an appeal to the Supreme Court of Arkansas, which was granted by the court.

Bill of Exceptions Settled & Signed.

Wherefore, on this 23rd day of Sept. 1908, the foregoing Bill of Exceptions is presented to the Honorable A. B. Grace, the regular judge presiding during all said proceedings, and is by him examined and found to be a correct record thereof, and approved as such, and ordered to be filed as part of the record of said cause.

Witness my hand as such Judge of the Eleventh Judicial Circuit of Arkansas, on this 23d day of Sept. 1908.

[SEAL.] ANTONIO B. GRACE,
Judge Eleventh Judicial Circuit of Arkansas. [SEAL.]

Filed September 28, 1908.

W. E. MEEKS, *Clk.*

60 In the Desha Circuit Court.

T. J. WYNNE, Plaintiff,
v.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Supersedeas Bond.

Whereas, the defendant, St. Louis, Iron Mountain and Southern Railway Company, has taken an appeal from the judgment of the Desha circuit court, rendered at its July term, 1908, against the St. Louis, Iron Mountain & Southern Railway Company in favor of the plaintiff, T. J. Wynne, for the sum of eight hundred seventy three dollars, with cost, and the defendant desires to supercede said judgment; now F. G. Bridges and H. Thane, sureties, hereby covenant with said plaintiff that the said defendant will pay to the plaintiff all costs and damage that may be adjudged against the defendant on the appeal, or in the event of the failure of the defendant to prosecute said appeal to a final judgment in the Supreme Court, or if said appeal shall for any cause be dismissed, that said sureties shall pay to the plaintiff all costs and damages, and shall perform the judgment of the court appealed from; also that said appeal shall be prosecuted without delay; also, that it will satisfy and perform the judgment or order appealed from, in case it should be affirmed and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order.

Witness our hands and seals this 23" day of September, 1908.

ST. LOUIS, IRON MOUNTAIN AND SOU. RY. CO.,
By BRIDGES, WOOLDRIDGE & GANTT, *Att'ys.*
H. THANE,
F. G. BRIDGES.

Approved Sept. 28", 1908.
W. E. MEEKS, *Clk.*

61 *Costs.*

Fee Bill:

Clerk's Costs	$5.45
Sheriff's Costs	7.70
Jury Tax	3.00
Attorneys' fees	50.00
Witnesses in Circuit Court	9.00
	75.15
This Transcript	16.10
	$91.25

62 *Certificate of Clerk.*

STATE OF ARKANSAS,
County of Desha:

I, W. E. Meeks, Clerk of the Desha Circuit Court, do hereby certify that the above and foregoing pages contain a true, perfect and complete transcript of all the pleadings, papers and court orders had in the cause mentioned in the caption, as the same appears of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, this 9th day of October, 1908.

[SEAL.] W. E. MEEKS,
Clerk of the Desha Circuit Court.

63 *Proceedings Sup. Court. Submission.*

In the Supreme Court.

STATE OF ARKANSAS, *set:*

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 24 day, being the fourth Monday of November, A. D. 1908, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 3rd day of May, 1909, a day of said term, and on the days stated:

SAINT LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Appellant,
v.
T. J. WYNNE, Appellee.

Appeal from Desha Circuit Court.

This cause being regularly called, come the parties by their respective attorneys, and this cause is submitted upon the transcript of the record and the briefs filed and by the court taken under advisement.

64 *Judgment Sup. Court* (1).

STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 24th day, being the fourth Monday of November, A. D. 1908, amongst others, were the following proceedings, on the 10th day of May, A. D. 1909, a day of said term:

ST. L., I. M. & SC. RY. CO., Appellant,
vs.
T. J. WYNNE, Appellee.

Appeal from Desha Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Desha County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered, be, and the same is hereby, in all things affirmed with costs, and that said Appellee recover of said Appellant and H. Thane and F. G. Bridges, sureties in the supersedeas bond filed in this cause, the sum of Eight Hundred and Seventy three dollars, with interest at Six per cent. per annum from the 16th day of July, A. D. 1908, the amount of judgment in said Circuit Court.

It is further considered, That said Appellee recover of said Appellant and said Sureties all his costs in this Court in this cause expended, and have execution thereof.

65 *Pet. for Rehearing Filed & Judgment Set Aside.*

STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Caption Omitted.

And on May 17th, 1909, comes the appellant by attorneys and files a petition for rehearing herein, which being duly served and said appellant praying for time in which to brief the same, is passed for two weeks for such briefs and submission.

MAY 22, 1909.

For the purpose of considering the petition for Rehearing filed in this cause and to continue jurisdiction thereof into the next term, it is ordered that the judgment rendered in this cause be and it is hereby vacated and set aside.

66 Caption Omitted.

MAY 31, 1909.

On motion the appellee is granted one week's time for filing brief on rehearing.

Submission on Rehearing.

Caption Omitted.

JUNE 7, 1909.

This cause in which a petition for rehearing has been filed, being called is submitted upon said petition, response thereto and briefs filed and by the court taken under advisement.

67 *Rehearing Denied.*

Caption Omitted.

JUNE 14, 1909.

Being fully advised the petition for a rehearing herein filed in this cause is by the court denied, and it is ordered that the judgment entered in this cause and afterwards set aside in order to consider said petition be now re-entered as the judgment of this court, which is accordingly done.

68 *Final Judgment.*

In the Supreme Court.

STATE OF ARKANSAS, *set:*

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 24th day, being the fourth Monday of May, A. D. 1909, amongst others, were the following proceedings, on the 14th day of June, A. D. 1909, a day of said term:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Appellant,
vs.
T. J. WYNNE, Appellee.

Appeal from Desha Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Desha County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered, be, and the same is hereby in all things affirmed with costs, and that said Appellee recover of said

Appellant and H. Thane and F. G. Bridges, Sureties in the supersedeas bond filed in this cause, the sum of Eight hundred and Seventy three dollars, with interest at Six per cent. per annum from the 16th day of July, A. D. 1908, the amount of judgment in said Circuit Court.

It is further considered, That said Appellee recover of said Appellant and said Sureties all his costs in this Court and the Court below in this cause expended, and have execution thereof.

69 *Opinion Supreme Court.*

In the Supreme Court of Arkansas, May 10, 1909.

No. 324.

ST. L., I. M. & S. RY. CO.
v.
WYNNE.

Opinion.

MCCULLOCH, *Ch. J.:*

This is an action against the railway company to recover damages for killing two horses by a train. The jury rendered a verdict in favor of the plaintiff, assessing the value of the horses at the amount mentioned in the complaint, and the court rendered judgment for double the value and for attorney's fees, pursuant to the terms of the statute, and the company appealed.

The constitutionality of the statute authorizing the assessment of double damages and attorney's fees is challenged. The statute is as follows:

"Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this State, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter, a true and correct description of such stock as may have been so killed or wounded at the nearest station house and nearest depot house, giving a true and correct description of the color, marks, brands and other natural description, that may assist in identifying such stock, and the time when and place where killed or wounded; and on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock killed and not advertised. And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

"And provided further, that if the owner of such stock
70 killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for,

then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fee." Act of February 27, 1907, amending Sec. 6774, Kirby's Digest.

Notice of the damage was given to the company in compliance with the statute, there was a failure to pay and the jury awarded the amount of damages sued for.

The statute is attacked on the ground that it is one to prescribe a penalty against railroad corporations for failure to pay its debts within a limited time. Such is not the design of the legislation. It applies to all carriers by rail, but is limited to damages for killing live stock by the operation of trains, when compensation for the damage is not paid within thirty days after notice.

The statute, before it was amended by the Act of 1907, provided only for double damages in case of failure on the part of the carrier to post notice with description of the stock killed. This court declared it to be valid, and at the same time disapproved a decision of the Supreme Court of Nebraska (Railroad v. Baty, 6 Brown, 46) declaring invalid a statute like the one now under consideration. L. R. & Ft. S. R. R. Co. v. Payne, 33 Ark. 816; M. & L. R. R. Co. v. Horsfall, 36 Ark. 651.

This court, and also the Supreme Court of the United States, has upheld a statute prescribing a penalty against insurance companies for failure to pay losses within a specified time. Ark. Ins. Co. v. McManus, 86 Ark. 115; Fid. Mut. Life Ass'n v. Mettler, 185 U. S. 308.

The Supreme Court of the United States has also upheld a statute of South Carolina prescribing a penalty against railroad companies for failure to pay, within specified time, for loss of or damage to property while in its possession. Seabord Air Line v. Seegars, 207 U. S. 73.

70½ A statute of Iowa made railroad corporations liable for stock killed at a place where the company had the right to fence the track but failed to do so, and authorized the recovery of double damages if the company neglected to pay the damage within thirty days after notice in writing. The validity of this statute was sustained by the Supreme Court of the United States in Minneapolis Ry. Co. v. Beckwith, 129 U. S. 26. Mr. Justice Field in delivering the opinion of the court said: "There must be not merely negligence of the company in not providing guards against accidents of this kind, but also its refusal to respond for the actual damage suffered. Without the additional amount allowed there would be few instances of prosecutions of railroad companies where the value of the animals killed, or injured by them is small, as in this case; the cost of the proceding would only augment the loss of the injured party.

The Supreme Court of Iowa, in sustaining the statute, said: "It was competent for the legislature to fix the consequences attending the failure to pay the simple or actual value of the property injured or destroyed. Of course, if the loss did not occur under such circumstances as to entitle the party complaining to recover, there

would be no liability for the double or any damages." Jones v. G. & C. Union Railroad Co. 16 Iowa 6.

71 Under the authority of these cases, no sound reason is perceived why this statute should not be upheld. It fixes no absolute liability for the damage, but merely provides, in case where liability exists, for assessment of double damages on account of failure to pay within thirty days after notice. Carriers by rail are, in the operation of trains, engaged in a work which is hazardous to stock running at large, but are only responsible for damage to stock when the damage is caused by negligence of their servants. It is a matter of common knowledge that in this State, where a considerable portion of the lands are unfenced and afford free range for live stock, it is customary to permit stock to run at large. It is therefore no unreasonable burden to require carriers, in cases where they are legally responsible for damage done to stock in the operation of trains, to pay the damages within a reasonable time prescribed by law. Frequently, the injury to live stock occurs at obscure places on the railroad when the trainmen are the only witnesses, and the evidence of negligence or non-negligence lies exclusively with them. The company, when notified of the damage, can readily investigate and ascertain whether or not it is responsible for the damage, and it is no hardship to require this to be done promptly. Thirty days, the time prescribed by this statute within which the railroad company is required to pay, is reasonable, for it affords sufficient time for investigation of a claim for damages before being required to pay.

A wholesome feature of this statute, which should not be overlooked in considering the question of its reasonableness, is that double damages can not be recovered where the verdict of a jury assessing the amount of damage is less than the amount sued for, thus putting a check on extravagant and unwarranted claims being made. We are of the opinion that the statute is valid.

It is also contended that the evidence does not sustain the verdict as to negligence, but we think there was enough evidence on this point to warrant the verdict.

Judgment affirmed.

Filed May 10, 1909.

P. D. ENGLISH, *Clerk.*

71½ No. 593.

In the Supreme Court of Arkansas.

No. 593.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant,

v.

T. J. WYNNE, Appellee.

Comes the appellant, the St. Louis, Iron Mountain & Southern Railway Company, and moves the Court to reconsider this cause, and as grounds therefor states:

1. That the Court erred in holding and deciding that the Act of Feb. 27, 1907, amending Sec. 6774 of Kirby's Digest was not in contravention to the equal protection clause of the 14th Amendment to the Constitution of the United States, in that it does not apply to all corporations alike but merely to corporations running railway trains.

2. That the Court erred in holding that the judgment in this cause and the Act of Feb. 27, 1907, amending Sec. 6774 of Kirby's Digest was not violative of the due process clause of the 14th Amendment to the Constitution of the United States and that the said judgment for penalty and attorney's fee did not constitute a taking of property without due process of law.

Whereof appellant prays that, on a reconsideration hereof, this cause be reversed.

E. B. KINSWORTHY,
LEWIS RHOTON,
CHAS. JACOBSON,
For Appellant.

I, E. B. Kinsworthy, counsel for appellant, hereby certify that the foregoing motion is not filed for delay but in order that justice may be done.

E. B. KINSWORTHY,
Att'y for Appellant.

Filed May 17, 1909.

P. D. ENGLISH, *Clerk.*

72 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

I, Peyton D. English, Clerk of said Supreme Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of T. J. Wynne, Plaintiff, vs. The Saint Louis, Iron Mountain & Southern Railway Co., Defendant, and also of the opinion of the court rendered therein, as the same now appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affix the seal of said Court at my office in Little Rock, Arkansas, this the 15th day of July, A. D. 1909.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

73 *Petition for Writ — Error, Assignment of Errors, & Prayer for Reversal.*

In the Supreme Court of Arkansas.

593.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant,

vs.

T. J. WYNNE, Appellee.

Petition for Writ of Error, Assignment, and Prayer.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above case, the Appellant, the St. Louis, Iron Mountain & Southern Railway Company, hereby prays a writ of error from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond,

And the said St. Louis, Iron Mountain & Southern Railway Company assigns the following errors in the records and proceedings of said case:

The Supreme Court of Arkansas erred in holding and deciding that Act 61 of the Acts of 1907, Acts of *Acts of* Arkansas, 1907, was valid. The validity of said Act was denied and drawn in question by the Appellant, the St. Louis, Iron Mountain & Southern Railway Company, on the ground of it being repugnant to the Constitution of the United States and in contravention thereof.

The errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding,

1st. That said Act did not deny the Appellant, the St. Louis, Iron Mountain & Southern Railway Company the equal protection of the law as guaranteed by the first Section of the 14th amendment to the constitution:

74 2nd. That said Act as applied to this Appellant, the St. Louis, Iron Mountain & Southern Railway Company, did not deprive it of its property without due process of law, as guaranteed by the first Section of the 14th amendment to the Federal Constitution.

For which errors the Appellant, the St. Louis, Iron Mountain & Southern Railway Company, prays that the said judgment of the Supreme Court of the State of Arkansas, dated the 14th day of June, 1909, be reversed, and a judgment rendered in favor of the Appellant Company, and for costs.

E. B. KINSWORTHY,
LEWIS RHOTON,
JAS. H. STEVENSON,
Attorneys for the St. Louis, Iron Mountain & Southern Railway Co.

Filed July 13, 1909.

PEYTON D. ENGLISH, *Clerk.*

75 *Allowance Writ of Error.*

STATE OF ARKANSAS, *ss:*

Supreme Court.

Let the writ of error issue upon the execution of a bond by the St. Louis, Iron Mountain & Southern Railway Company, to T. J. Winn, in the sum of $1500.00; such bond, when approved to act as a supersedeas.

Dated twelfth day of July, 1909.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas, Acting and Presiding as Such Now and at the Time of the Judgment Herein.

Filed July 13, 1909.

PEYTON D. ENGLISH, *Clerk.*

76 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Court before you or some of you, being the highest Court of Law or Equity of the said State, in which a decision could be had in the said suit between T. J. Wynne and the St. Louis, Iron Mountain & Southern Railway Company, a corporation, wherein was drawn in question the validity of a statute of the said State of Arkansas, on the grounds of its being repugnant to the constitution of the United States, and the decision was in favor of its validity; and manifest error hath happened to the great damage of the said St. Louis, Iron Mountain & Southern Railway Company as by its complaint appears.

We being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the records and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the
77 United States, the 13 day of July, in the year of our Lord, One Thousand Nine Hundred and Nine.

[The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

W. P. FEILD,
Clerk of the Circuit Court of the United States, Eastern District of Arkansas, Western Division.
By W. PRESLEY FEILD, *D. C.*

Allowed.
E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed July 13, 1909.
PEYTON D. ENGLISH, *Clerk.*

78 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

I Peyton D. English, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on July 13, 1909, in the matter of T. J. Wynne vs. Saint Louis, Iron Mountain & Southern Railway Co.:

1. The Original bond of which a copy is herein set forth.
2. Three copies of the Writ of Error, one for Defendant in Error, one to be retained by me, and the original herein attached and set forth.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Little Rock, Arkansas, this 15th day of July, A. D. 1909.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

79 Copy.

Supersedeas Bond.

In the Supreme Court of Arkansas.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Plaintiff in Error,
vs.
T. J. WYNNE, Defendant in Error.

Bond.

Know all men by these presents:

That, we, The St. Louis, Iron Mountain & Southern Railway Company, as principal, and H. C. Rather and L. W. Cherry, as sureties are

held and firmly bound unto T. J. Winn, in the sum of $1500.00, to be paid to the said T. J. Winn, to which payment well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of July, 1909.

Whereas, the Plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such that if the above named Plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By E. B. KINSWORTHY, *Att'y.*

H. C. RATHER.
L. W. CHERRY.

Attest:

——— ———.

80 STATE OF ARKANSAS,
Pulaski County, ss:

H. C. Rather and L. W. Cherry, being duly sworn on oath, depose and say: We are each of lawful age and are citizens of the State of Arkansas and knows the contents of the foregoing instrument to which we have signed our names. We each for himself say we are worth the sum of $1500.00 over and above all debts, liabilities, and exemptions.

H. C. RATHER.
L. W. CHERRY.

Subscribed and sworn to before me this 12th day of July, 1909.

[Seal H. R. Young, Notary Public, Pulaski County, Ark.]

H. R. YOUNG,
Notary Public, Pulaski County, Ark.

My commission expires 12th day of March, 1913.

Bond approved and to operate as supersedeas.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed July 13, 1909.

PEYTON D. ENGLISH, *Clerk.*

81 *Original Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas J. Wynne, Greeting:

You are hereby cited and admonished to appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the St. Louis, Iron Mountain & Southern Railway Company is Plaintiff in error, and you are Defendant in error, to show cause, if any there be, why judgment rendered against Plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the State of Arkansas, this 12 day of July, 1909.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

[Seal of the Supreme Court of Arkansas.]

Attest:
PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

Service.

LITTLE ROCK, ARKANSAS, 14 *Day of July,* 1909.

I, attorney of record, for the Defendant in error, in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

ROBERT E. WILEY,
Attorney for Thomas J. Winn.

82 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Arkansas.

In obedience to the Commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified Transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this July 15, A. D. 1909.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

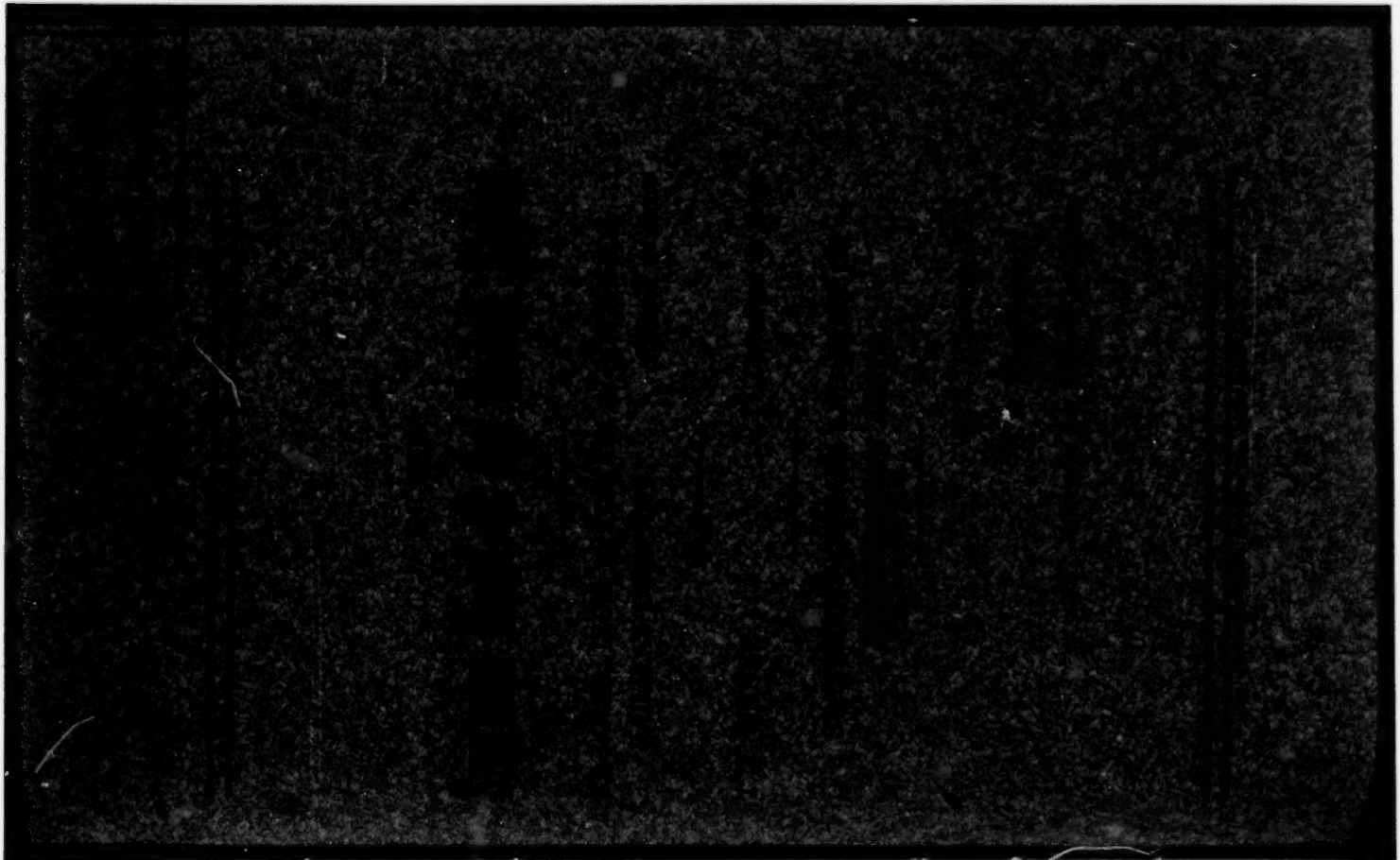
Costs.

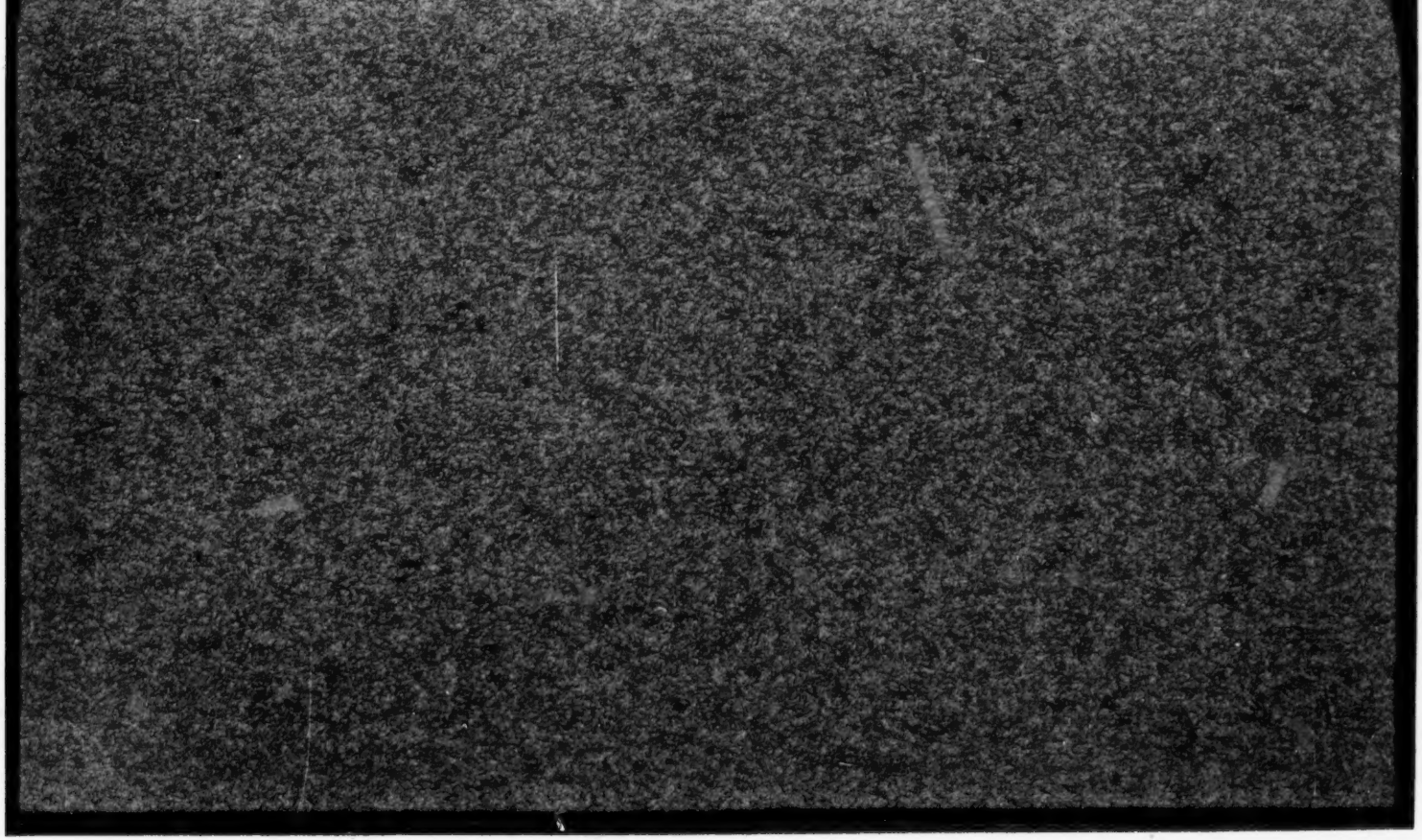
Transcript to U. S. Sup. Ct. and Clerk Sup. Ct. fees, $32.00, paid by Pl'ff in error.
Costs Sup. Court Printing Briefs, $15.00, p'd by Ry. Co.
Transcript Sup. Ct., $16.10, " " " "
Advance costs Clerk, $11.50, " " " "
Costs Ct. Ct., 75.15, not paid.

Attest:

PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 21,769. Arkansas supreme court. Term No. 284. St. Louis, Iron Mountain & Southern Railway Company, plaintiff in error, vs. T. J. Wynne. Filed July 22d, 1909. File No. 21,769.





IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.....*Plaintiff in Error*

v. No. ———.

T. J. WYNNE.....*Defendant in Error*

STATEMENT OF CASE AND BRIEF OF ~~DEFENDANT~~ PLAINTIFF IN ERROR.

STATEMENT OF CASE.

We seek by writ of error to review a judgment of the Supreme Court of Arkansas, which was rendered in accordance with the provisions of a statute that permits a recovery of double damages and attorney's fees in actions for the value of animals killed in the operation of cars in cases where claims were presented and payment not made within thirty days after notice was given and before suit was brought.

The action was commenced in the State court, by filing a complaint, which contained allegations such as are usual in

actions seeking to recover damages caused by the killing of animals by reason of the negligence of trainmen in the operation of trains. The allegations were, in effect, that the plaintiff was the owner of two horses which had been killed by a collision with one of defendant's trains of cars, and that the collision was due to the negligence of defendant's servants in operating the cars. The complaint contained the further ellegations that the plaintiff had given defendant notice of his claim more than thirty days before the institution of the suit, and that defendant had failed to pay it. Damage was laid at four hundred dollars, and judgment was asked for that sum and for costs, and for all further relief (Rec. 2 and 3).

The defendant answered the complaint and denied the several acts of negligence alleged, or that the horses were killed by reason of any negligence or carelessness on part of its employees, or that the plaintiff had been damaged in the sum of four hundred dollars, the amount alleged in the complaint (Rec. 5).

The cause was tried before a jury. The plaintiff produced witnesses who detailed the circumstances of the collision and stated their opinions as to the value of the horses killed. The plaintiff testified that they were worth $500.00, while witnesses introduced by him fixed their value at $400.00 and $450.00, respectively (Rec. 14, 20, 26). The defendant produced two witnesses who valued the horses at $300.00 and $400.00, respectively (Rec. 42, 43); and testimony was introduced on behalf of defendant, tending to

show that at the time of the collision the trainmen were in the exercise of due care, and that the collision arose from no fault of defendant. The plaintiff introduced in evidence the claim he had presented to defendant, and proved that it had been presented more than thirty days before suit was brought, and that it had not been paid (Rec. 14, 31, 32). In the claim so presented, the value of the horses was stated to be $250.00 each (Rec. 32).

At the end of the testimony the court submitted the cause to the jury, and left it to determine whether the collision was due to negligence on part of defendant's trainmen. It further submitted two questions to be answered by the jury: (1) Whether the plaintiff gave notice to defendant of the killing of the two horses and of his claim for damages more than thirty days before bringing his action; and, (2) what was the fair market value of the horses (Rec. 51, 52). The jury found a general verdict against the defendant and assessed the damages at $423.00, being $400.00 for the value of the horses and $23 interest to the date of the trial. In answer to the questions, it found that the plaintiff had made a claim more than thirty days before the action was instituted, and that the value of the horses was $400.00 (Rec. 53).

After the jury returned its verdict, the plaintiff filed a motion for a judgment for double damages, and for a reasonable attorney's fee, as authorized by Act 61 of the General Assembly of Arkansas of 1907 (Rec. 54).

To the above motion the defendant filed a written response, resisting the application on the ground that the statute relied upon was invalid, because it conflicted with various designated provisions of the State and Federal Constitutions. The only grounds of the response that need be set out here, are such as relate to the equal protection and due process provisions of the Fourteenth Amendment of the Constitution of the United States, and are stated in the response as follows:

> "4. Because it is contrary to and in conflict with section 1, of article 14, of the Amendments to the Constitution of the United States, in that it deprives the defendant of its property without due process of law.
>
> "5. Because it is contrary to and in conflict with section 1, of article 14, of the Amendments to the Constitution of the United States, because it denies to defendant the equal protection of the laws.
>
> "6. Because the penalty imposed for failure to pay within thirty days after notice is served, such penalty being an amount equal to the damages awarded by the jury and as attorney's fee, is so excessive as to deny to defendant the right of making defense to claims of such nature."

The trial court overruled the objections of defendant and sustained plaintiff's motion, rendering judgment for double the assessed value of the horses, for interest on such value to the date of the trial, for $50.00 attorney's fee, and for all cost (Rec. 8, 57).

An appeal was taken to the Supreme Court of Arkansas, where the judgment was affirmed. An opinion of the

court was handed down by Chief Justice McCulloch, in which all grounds of reversal were decided adversely to the appellant, and it was expressly held that the statute and the judgment rendered under its authority were not repugnant to either provision of the Fourteenth Amendment of the Constitution of the United States (Rec. 69).

Thereupon the railway company filed its assignment of errors, with its petition for a writ of error. The writ was allowed, bond filed and approved, and a transcript of the record was duly filed in this court (Rec. 73-82). The statute under which the judgment was rendered is as follows:

"ACT 61: An Act to amend section 6774 of Kirby's Digest.

"SECTION 1. That section 6774 of Kirby's Digest be amended to read as follows:

"Section 6774. Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this State, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter, a true and correct description of such stock as may have been so killed or wounded at the nearest station house and nearest depot house, giving a true and correct description of the color, marks, brands and other natural description, that may assist in identifying such stock, and the time when and the place where killed or wounded; and on failure to so advertise any

stock so killed or wounded, the owner shall recover double damages for all stock killed and not advertised. And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such case, and a reasonable attorney's fee.

"And, provided, further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees."

SPECIFICATION OF ERRORS.

The sole error we rely on is, the ruling of the court that the statute is valid as applied to this case, and that it did not deny to the defendant the equal protection of the law, or deprive it of its property without due process of law, in violation of the Fourteenth Amendment. The assignment of errors is as follows:

"The Supreme Court of Arkansas erred in holding and deciding that Act 61 of the Acts of 1907, was valid. The validity of said Act was denied and drawn in question by the appellant, the St. Louis, Iron Mountain & Southern Railway Company, on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

"The errors are more particularly set forth as follows

"The Supreme Court of Arkansas erred in holding and deciding,

"1. That said act did not deny the appellant, the St. Louis, Iron Mountain & Southern Railway Company, the equal protection of the law as guaranteed by the first section of the Fourteenth Amendment to the Constitution.

"2. That said act as applied to this appellant, the St. Louis, Iron Mountain & Southern Railway Company, did not deprive it of its property without due process of law, as guaranteed by the first section of the Fourteenth Amendment to the Federal Constitution."

BRIEF.

On behalf of the railway company, we contend that the statute and judgment deprive it of its property without due process of law and are unconstitutional and void, since they require the payment of double damages and an attorney's fee, merely because the company failed to pay an unliquidated demand, with respect to which there were *bona fide* and substantial doubts as to the extent of the damage and as to its liability.

We contend that its invalidity is particularly manifest in cases like this, since the demand, which was not paid, fixed the damage at an amount greater than the claimant subsequently sued for, and greater than the damage assessed by the jury that tried this case.

We have set out enough of the pleadings and evidence to show that there were substantial grounds to contest the claim, and that the failure to make payment was justified by the result.

Under the laws of Arkansas, the liability of a railway company for damages to animals killed by its cars is not absolute, but depends upon some fault on its part in causing the damage, and there is no statute requiring that railroad tracks be fenced. The complaint in this case was based upon the alleged negligence of the trainmen in the operation of the cars that killed the horses. The trial court charged the jury that the right of recovery depended upon proving such negligence, and the opinion of the Supreme Court sustains this as the correct rule of accountability.

So that the mere fact that the horses were killed by the train, did not establish the railway's liability. And if it was liable for any amount, it could not exceed the reasonable market value of the horses killed. When the plaintiff presented his claim, it was the duty of the railway to ascertain whether the damage was due to its fault, and, if so, whether the amount claimed was proper. If it found that the damage was not due to any fault on its part, or that the amount claimed was excessive, it was bound to refuse payment. Or if the facts and circumstances were such as to leave the question of its liability, or of the extent of claimant's damage, fairly in doubt, its duty was still to refuse payment.

Upon claims for damage to property caused by collisions, the law of Arkansas applies the same rule of decision to persons and corporations operating railroads as to all other persons and corporations in like case. Where damage results from failure to exercise care, there is liability; where it results when due care is exercised, there is no liability. And the character of the person or corporation charged is entirely immaterial in determining that question. What excuses others, excuses those operating railroads; what affords a defense to other persons, is equally a defense to them. The only difference respects the burden of proof, —it being on railway companies to prove due care, while it is on the plaintiff, in other cases, to prove negligence.

The law not only recognizes a defense, but it maintains courts to entertain and try it. The railway company, in failing to pay the claim and in submiting to the courts the question of its liability, acts entirely within its lawful rights.

There is nothing in the record to indicate that in this case, the appeal to the courts was intended to delay or harass the claimant. On the contrary, it appears by the record that after the failure of payment for thirty days, the claimant voluntarily reduced his claim to the extent of $100.00; and the jury, by its verdict, assessed the value of the horses at $100.00 less than was originally claimed. But neither the statute relied upon to maintain the judgment, nor the opinion of the court, makes material the question of *bona fides* in contesting a claim; according to each, the

penalty follows a failure to pay for thirty days, whether it was intended to harass and delay, or was prompted by a *bona fide* question of liability.

So we submit that the judgment for attorney's fees and double damages, is based upon a mere failure to pay a claim for thirty days after it was presented, and that, to this extent, it takes the money of the railway and gives it to the claimant, merely because the railway exercised its legal right to submit a substantial question as to its liability to the decision of the courts, and succeeded only in part in making good its defense. And we submit further, that it is not due process of law to take the property of one party and give it to the other, as the price of being permitted to make a *bona fide* defense in the courts. In other words, we contend, that since the law affords grounds of defense to railways, in common with others, and gives them the right to submit their defenses to the decision of the courts, a statute or judgment which takes money from them and gives it to claimants, by way of penalty for delay necessarily incident to a trial in court, is not due process of law, and that it plainly is not due process of law where the trial shows that the claim as presented was excessive.

And our further contention is, that, since the statute provides heavy penalties against railway companies that are not provided against others, for a mere failure to pay a disputed claim; and since no penalty is imposed on a claimant, who presents a demand against a railway that is invalid or excessive; and since the heavy penalty of

double damages and attorney's fee was designed, and is calculated to deter railways from exercising their lawful right, to defend any doubtful claim, and to coerce the payment of all claims, whether fair or unfair, unless their invalidity be obvious or certainly demonstrable, that such discrimination and designed coercion operate to deny to railways the equal protection of the laws.

The propositions submitted are so nearly akin, that it seems best to treat them in a general way, together. We will now state at some greater length, the process by which we reach our conclusions.

A claim was presented against the railway for $500.00, as damages for killing two horses, by the alleged negligent movement of a train of cars. Care in the movement of the cars was a complete defense against the claim, and the facts afforded a substantial ground to contend that care was exercised. If the horses were worth less than $500.00 the claim made was excessive, and witnesses differed as to such value, some fixing it as low as $300.00. In the action instituted more than thirty days after the claim was presented, and at a time when the right to the penalty had accrued under the provisions of the statute, the claimant fixed his damages at $400.00, being $100.00 less than the amount fixed in the unpaid claim; and in the subsequent trial of the case the jury returned a special verdict assessing the value at $400.00. So the railway was bound to refuse payment in order to test its liability, and it failed to pay for no other reason. It could not exercise

that right without failing to pay, and as a result of it this action was brought and a jury assessed the claimant's damage at $100.00 less than he had exacted. By reason of refusing to pay the railway got a reduction of $100.00 on the claim; but, also, on account of such failure, the railway is adjudged to submit to the penalty of $50.00 for an attorney's fee, and $400.00, as double damages.

The precise ground for imposing the penalty is a failure to pay the claim for thirty days. But payment would have precluded all contest, and the railway was put to its election between hazarding the penalty or paying a claim which was disputed in whole and in part found to be excessive.

Since the railway exercised a lawful right in presenting to the courts a *bona fide* defense, based upon substantial grounds, we contend that the imposition of the penalty of attorneys' fees and double damages, for not paying before suit was brought, would be a taking of property without due process of law. Surely it could not be bound, consistently with due process of law, to pay such a penalty for the mere failure to pay the claim presented, when it was shown to be excessive in the suit afterwards brought.

We contend that a penalty, in excess of costs and reasonable expenses, cannot be imposed for a complete failure to make good a defense against an ordinary indebtedness. But if mistaken in that, we confidently insist that no penalty

is proper for failing to pay, and contesting in court a claim which such contest proves to have been excessive. If the statute relied on, and the judgment based upon it are sustained, it is held to be lawful to take from the railway $50.00, as an attorney's fee and $400.00, as double damages, for the privilege of compelling the reduction of an excessive claim to a fair amount; and, such deprivation of property, as the price of exercising a lawful right, is held to be due process of law. It seems rather to be an arbitrary exaction, unfair and without reason, and in violation of every conception of due process of law.

There is an Arkansas case which, we think, sustains our contention on this point exactly. It arose under Act 115, of the Acts of the Arkansas General Assembly of 1905, with respect to claims against insurance companies, and contains the following provision:

> "Section 1. In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor, shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, 12 per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fee to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

It will be observed that this contains no provision limiting the recovery of penalties to cases in which the amount of the verdict rendered equals that sued for. But,

in the case of the Pacific Mutual Life Insurance Company against Carter, 92 Ark. 378, 387, one Carter brought suit on a policy of insurance for $1,666.66, when by its terms he was entitled to but $1,444.44. The insurance company had failed to make payment of the amount found due within the time prescribed by the statute, and the trial court, following the language of the statute, rendered a judgment for the amount to which he was entitled, and in addition to that, for an attorney's fee and the penalty provided by the statute. On appeal to the Supreme Court, the judgment was affirmed to the extent of the amount due on the policy, but reversed as to the penalty and attorney's fee. Speaking of that part of the judgment reversed, the court said:

"But the act makes the company liable for failure to pay the loss after demand made therefor. The statute thus contemplates that there shall be a demand. A recovery for penalty and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. *Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it. The*

appellee, by asking judgment for $1,444.44, *concedes that he was demanding more in his complaint than he was entitled to receive.* The judgment for the penalty and attorney's fee is therefore set aside, and the judgment of the circuit court will be affirmed," for $1,444.44, with interest from date of judgment at 6 per cent.

The case above cited directly sustains the right of the debtor to refuse to pay, and to resist the collection of an excessive demand, and plainly says of a statute that would penalize it for so doing, that "such an act would be unconstitutional." In a later case, Industrial Mutual Indemnity Company v. Armstrong, 93 Ark. 85, this opinion was followed and cited with approval.

When the plaintiff presented his claim, fixing the value of horses at $500.00, which were worth but $400.00, the defendant was under no obligation in law or otherwise to pay it. On the contrary, it had a perfect defense to so much of the claim as was excessive, and its managing officers were under obligations to insist upon it. If they did so, they were bound to fail for 30 days to pay the claim.

Since the railway was entitled, under the law applicable to it and others alike, to demand a reduction of the claim, and since the penalty is imposed, under the statute applicable to railways only, for delay of payment necessary to obtain the reduction, we submit that the special statute takes property without due process of law and denies the equal protection of the law.

In the case of Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, the invalidity of a somewhat similar statute is demonstrated by Mr. Justice Brewer. In that case, the penalty was limited to an attorney's fee of $10.00, and extended to a great variety of claims. The court held that the statute was void because it penalized a mere delay in paying a debt and applied to only a single class of debtors. It would seem that much more could be said against the validity of the Arkansas statute than against the Texas statute that was held invalid in that case.

In the later case of the Atchison, Topeka & Santa Fe Ry. v. Mathews, 174 U. S. 96, the validity of a Kansas statute was questioned. That statute was entitled, "An Act relating to the liability of railroads for damages by fire," and it provided that whenever judgment was rendered in favor of the plaintiff for damages caused by fire in the operation of trains, there should be allowed him by the court a reasonable attorney's fee to become a part of the judgment. The Ellis case was relied upon to sustain the attack on this statute; but the court held that the primary object of this statute was to prevent the setting of fires in the operation of trains, that it was in effect a police regulation, and that the penalty was provided as a means of enforcing it. And, speaking with reference to the statute attacked in the Ellis case, it said: "It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulation. It was so regarded by the Supreme Court of the State, and its construction was accepted in this court as

correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act with respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification; and there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation." The court approved the views so expressed in the Ellis case, but proceeded to show that the statute attacked in the case under decision, was in its purpose and effect a police regulation, and therefore distinguishable from the earlier case.

The two cases above cited indicate very clearly the rule of decision in this court. The reasons for it are plainly stated, and applying it to the case at bar, it seems that but one result can follow. The statute relied upon in this case has not a single police feature, unless it can be said that the payment of debts in general is a matter of police regulation; and this court has said, in the case quoted, "compelling the payment of debts is not a police regulation."

The case of Seaboard Air Line v. Seegers, 207 U. S. 73, is relied upon to sustain the statute. But that case depended upon a statute which was applicable only to claims for loss of or damage to property while in the possession of a common carrier. It required payment within 40 days after the filing of the claim with the agent of the carrier, and it provided that a failure to adjust and pay the claim

within the time allowed should subject the carrier to a penalty of $50.00, to be recovered by the consignee aggrieved, with a proviso that unless the consignee recovered the full amount claimed no penalty should be recovered. It is confined to claims that arise in performing the duties of a common carrier, against which there is practically no defense. The sole question in them is as to the extent of the damage. As the damage is done while the property is in the custody of the carrier, it has every means of making a speedy and accurate assessment of the amount, and unnecessary delay is vexatious and harassing. It has advantages in this respect over the consignee, and if it delays the adjustment the means of proving the damage may be destroyed, so that a prompt adjustment is essential to the protection of the consignee. In these respects the purpose of the statute sustained in that case is wholly unlike the purpose of the statute under consideration. This statute applies to claims where the liability is not absolute, but depends upon a showing of negligence. The carrier has no superior advantage in assessing the damage. On the contrary, the advantage is with the property owner, who knows better the original value of the property, and the extent of the damage done to it.

Another very important difference between the two statutes is that by the terms of the one the penalty is not allowed unless the amount recovered is as great as the amount claimed; in the one under consideration, the penalty is imposed even though the amount recovered is less than the amount claimed; provided, only, that the amount recov-

ered be as great as the amount sued for. It matters not how large the claim is, as presented and dishonored, if the carrier refuses to pay it and the claimant subsequently sues for a smaller amount, and get judgment for that amount, as was done in this case, the statute allows the penalty.

Another material difference between the statutes is in the amount of the penalty. In the one sustained the penalty was limited to $50.00, which the court treated as but a fair return for the expense to which the claimant was put in establishing his claim. In the statute under consideration, the claimant is awarded costs, interest, and attorney's fee (the latter without limit), which give him all the compensation that is reasonable for his trouble and expense in the suit; and in addition to all that, it allows him just twice the damage that he sustained. Since the claimant has been compensated for his trouble, expense and delay, by an allowance of costs, attorney's fee and interest, an allowance of double damages can only be regarded as a penalty, pure and simple.

The court, in that case, said the statute was not primarily to enforce the collection of a debt, but to compel the performance of duties which the carrier assumed. That duty, no doubt, was to carry safely and deliver property received for transportation. Since the damage occurs while the property is in its custody, it has, as before stated, opportunities for fixing the damage which the property owner has not; and it should do its duty in that respect promptly, while the means of investigation are at hand and the property

owner may get the proof if it fails to do so. Moreover, the penalty in that case was small, and this was referred to by the court, with the statement, that there were limits beyond which penalties could not be imposed even where they were proper.

Since the liability to a penalty in this case, follows a failure to pay, without regard to the facts constituting negligence, it can not be sustained on the ground that it was intended to enforce the performance of a duty under a police regulation. There is no law requiring railroads to fence their tracks in Arkansas, as was referred to by the court in Railway v. Payne, 33 Ark., 816, 824. The complaint in this case alleged no breach of any duty under a police regulation, as a basis to recover the penalty, but after the jury had returned a verdict fixing the defendant's liability, the court sustained a motion to allow the penalty, merely upon a showing that a claim had been presented for more than thirty days before the suit was brought. In the opinion delivered by the Supreme Court, affirming the judgment of the circuit court, this language was used: "It (the statute), fixes no absolute liability for the damage, but merely provides in cases where liability exists, *for assessment of double damages on account of failure to pay within 30 days after notice.*" This shows that the Supreme Court did not sustain the penalty on the ground that it was intended to enforce performance of a duty under a police regulation.

We think that this statute in its different provisions illustrates the difference between a penalty imposed for breach

of a duty under a police regulation, and a mere failure to pay a debt. By one provision, it requires that notice of injury to animals in the operation of trains be posted, and provides a penalty for failure to do so. A duty is imposed plainly for the protection of property owners, and a penalty is prescribed for failing to discharge it. This penalty does not depend upon an adjudication of liability for the damage done, but only upon the omission of a duty imposed, such duty being deemed necessary to inform owners of live stock of injuries done to it, in order that they may investigate and make claims where they deem it proper. It plainly intends to enforce a police regulation. But the penalty which we now attack is conditioned upon the breach of no duty, whatever, except the duty to pay a disputed claim, which, from its nature, is necessarily unliquidated as to amount, and with respect to which delay in payment may often be, not only reasonable, but necessary.

We contend the statute is invalid for the further reason that it was designed and is calculated, by its heavy penalties, to deter railroads from contesting any claim fairly involved in doubt, either with respect to liability or the amount of damage, and to coerce the payment of all such claims; that in this respect, it denies to railroads the equal protection of the law, contrary to the equal protection guaranties of the Fourteenth Amendment.

Ex parte Young, 209 U. S. 123, 145.

Questions of negligence and due care are questions of fact, to be determined by a consideration of a variety of

circumstances, and are usually submitted to a jury. The fact that juries are not specially prone to decide such issues in favor of railroads, but rather incline to the side of the claimant, is within the observation and experience of lawyers and judges generally. A railroad can rarely feel certain of a verdict in its favor, even when all the facts and circumstances known to, or ascertainable by it, seem to favor it. The uncertainty as to the outcome is so great necessarily that the penalties provided by this act are sufficient, and must have been designed to compel railroads to relinquish their right of defense, and settle all doubtful claims as a matter of economy. The result in this case well illustrates the wisdom of settling. The record shows, both from the testimony of the witnesses, the charge of the trial court, and the opinion of the Supreme Court, that there was a *bona fide* and substantial doubt as to the liability of the defendant, and by reason of its failure to pay within the time allowed by the statute it obtained a reduction of the claim to the extent of $100. But since it was penalized to the extent of $450, it would have been better to pay the claim as presented, excess and all.

If the statute is sustained, the only prudent course for railroads to pursue, in view of the well recognized attitude of juries in this class of cases, is to pay within the time allowed all claims that are presented, and they will be forced to do so. So that, the practical effect of the statute is to impose absolute liability, and, in effect, to deny the right to defend.

The language of the statute and its reasonable effect, bear out the idea that it was intended to compel payment of all claims of this class, without respect to the questions of negligence or due care. The Legislature was of opinion that absolute liability could not be imposed, but that the limit of its power was to impose liability only in cases of negligence. Such had been decided by the Supreme Court of the State, in Railway v. Payne, 33 Ark. 820. In that case it had been said that it was not within the power of the Legislature to fix liability for damages not caused by its breach of duty, and that it could not, constitutionally, be deprived of the power to show the circumstances that excused it. It thus appeared from a decision of our court that it was not within the power of the Legislature to impose an absolute liability. With that in view, the Legislature provided penalties for a failure to pay any claim presented within a time specified, which was made so short that no adjudication as to liability was possible, before the penalty would accrue. And it made the penalties so severe, that prudence and economy would prompt the payment of all claims presented rather than hazard the result of a suit and incur the penalties of defeat. The tendency to coerce payment becomes stronger, in view of the well-recognized fact that juries, trying the issues of negligence and due care, generally incline to favor the claimant as against the railroad.

The statute denies the railways the equal protection of the law, since they are penalized for making the same defense that all other persons can make without risk of pen-

alty, and for the further reason, that claimants who present unfounded or excessive claims and press them to an unsuccessful termination, incur no penalty and in no way compensate the road for its expense, trouble and cost.

In the opinion filed by the Supreme Court of Arkansas, the cases of the Fidelity Mutual Life Association v. Mettler, 185 U. S. 308, and Minn. Ry. Co. v. Beckwith, 129 U. S. 96, are relied upon to sustain the act. We submit that when the reasons for the decision of those cases are considered, they do not afford the support claimed for them. In the former case this court based its conclusion upon the reserved power of the State to amend corporate charters. That reason can not be given to sustain the statute under consideration, for the reason that it applies alike to all claims for animals killed or injured in the operation of trains, whether the trains are run by individuals, partnerships, receivers of court, or corporations. In the latter case above cited, the statute was upheld on the ground that the damage was allowed for a failure to fence the track, a duty imposed by law. As before stated, we have no statute requiring railroads to fence their tracks, or imposing any liability for failure to do so, and the condition, with respect to fencing, is not relied on to sustain the judgment or a feature of the statute.

We respectfully submit that the statute and judgment deny to the railroad the equal protection of the law, and deprive it of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution, and

for that reason are invalid, and that the judgment should be reversed.

Respectfully submitted,

W. E. HEMINGWAY,

E. B. KINSWORTHY,

Attorneys for Plaintiff in Error.

10

Office Supreme Court, U. S.
FILED.
DEC 21 1911
JAMES H. McKENNEY,
CLERK.

In the United States Supreme Court

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

v. No. 103, October Term, 1911

T. J. WYNNE.

BRIEF FOR DEFENDANT IN ERROR.

R. E. WILEY,
POWELL CLAYTON,
Attorneys for Defendant in Error.

IN THE
Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY..*Plaintiff in Error,*

v. No. 103, October Term, 1911

T. J. WYNNE.....*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

The only question involved here is whether the act of Arkansas approved February 27, 1907 (Acts of 1907, p. 144), is in conflict with the constitution of the United States in that it denies to the plaintiff in error the equal protection of the law or deprives it of its property without due process of law. This court will not look into the record to see whether the facts proved justified a recovery under the statute of Arkansas, as that question is concluded by the finding and judgment of the Supreme Court of Arkansas. That court said (Rec., p. 37): "Notice of the damage was given to the company in compliance with the statute; there was a failure to pay, and the jury awarded the amount of damages sued for."

This finding will not be reviewed by this court.

Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S., 220, and cases cited.

Is the statute unconstitutional because it provides that the railroad shall pay the damages within thirty days after *notice,* and permits a recovery of the penalty if the plaintiff recovers the amount *sued for?* It was urged in the hearing before the State court that the statute permitted the owner to demand an amount which was clearly excessive and to refuse to accept anything less until he brought his suit, and then, by reducing his demand in his complaint to a reasonable sum, he could fasten an absolute liability upon the defendant for the penalty without giving it an opportunity to contest its liability, although it had succeeded in its contention that it was not liable for the full amount originally demanded. But we submit that this is not the true construction of the statute. It is an elementary rule that statutes must be interpreted, if possible, to make them consistent with the constitution.

Hooper v. California, 155 U. S., 648, 657.

Presser v. Illinois, 116 U. S., 252, 269.

Grenada Co. Suprs. v. Brown, 112 U. S., 261, 269.

Brewer v. Blougher, 14 Pet., 178, 198.

United States v. Coombs, 12 Pet., 72.

Parsons v. Bedford, 3 Pet., 433, 448.

Knights Templars' & Masons' Ind. Co. v. Jarman, 187 U. S., 197, 205.

In Brewer v. Blougher, 14 Pet., 178, 198, this court said:

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

The statute in the case at bar requires the railroad to pay the owner of the stock within thirty days after notice is served on such railroad by the owner. The primary object of the notice obviously is to apprise the railroad of the ownership and to give it an opportunity to investigate the matter; the object is not to require the owner to make his demand for a specific sum of money at that time. The mere fact that the actual value of the stock is fixed in the notice at more than the amount afterwards demanded in the complaint does not amount to a denial to the railroad of the right to contest an excessive claim, for when the demand is made in the complaint for a definite amount, less than the value fixed in the notice, the railroad company can pay the amount demanded and defeat a recovery of the penalty. If the railroad stands ready at all times to pay the real value of the stock, there can be no penalty or attorneys' fees. But if it refuses to pay what

is justly due and what is demanded in the complaint, it takes its chances; and the justness of the amount demanded is peculiarly one for a jury. If a less amount is awarded by the jury than is sued for, the statute in question expressly provides that there shall be no penalty or attorneys' fees recovered, and the defendant can be made to pay no more than the amount recovered; and if defendant has followed the practice outlined in section 6283 of Kirby's Digest of the Statutes of Arkansas, the costs will be cast upon the plaintiff.

We submit that the true construction of the statute is that the railroad must have thirty days' notice of the killing of the stock, and within this thirty days it must pay the true value on demand. If the demand for the amount due is made for the first time in the complaint, then the railroad may defeat a recovery of the penalty by paying the amount sued for.

In this case the railroad denied all the allegations of the complaint, even that it had killed the horses, and, having had more than thirty days in which to investigate the claim, and failing to pay the amount due on demand, it cannot complain at having to pay the penalty.

But if it is thought that the notice must state the amount demanded, then the filing of the complaint would be a new notice and a new demand for the amount therein stated, and it would be incumbent on the railroad company to pay this amount within thirty

days or suffer the consequences of its refusal to do so. If the demand was for more than what was justly due, the company would suffer no damage by contesting the demand, for there would be a recovery for a less amount than sued for.

It is true that a railroad company has the right to resist a demand that it does not owe, but the demand is always governed by the allegations of the complaint, and not by any prior negotiations between the parties, and the jury in the case at bar has determined that the plaintiff in error did owe the amount demanded. In Pacific Mut. Life Ins. Co. v. Carter, 92 Ark., 379, and Haglin v. Atkinson-Williams Hardware Co., 93 Ark., 85, the amount recovered in each instance was less than the amount demanded in the complaint, and for this reason these cases cited have no bearing on the case at bar. They were both decided after the case at bar, and in neither of them is there any intimation that this case was overruled or modified.

Is the statute, when properly construed, in conflict with the Fourteenth Amendment to the Constitution of the United States? We submit that it is not, and that this case is ruled by Seaboard Air Line Railway v. Seegers, 207 U. S., 73. That case involved the constitutionality of a statute of South Carolina subjecting common carriers to a penalty for failing to settle claims for loss or damage to freight within forty days, and this court said (p. 77):

"We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the non-payment of debts. As the Supreme Court of South Carolina said in Best v. Seaboard Air Line R. Co., 72 S. C., 479:

" 'The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.' "

In the case at bar, the Supreme Court of Arkansas said (Rec., pp. 37, 38):

"The statute is attacked on the ground that it is one to prescribe a penalty against railroad corporations for failure to pay its debts within a limited time. Such is not the design of the legislation. It applies to all carriers by rail, but is limited to damages for killing live stock by the operation of trains, when compensation for the damage is not paid within thirty days after notice. * * * No sound reason is perceived why this statute should not be upheld. It fixes no absolute liability for the damage, but merely provides, in case where liability exists, for assessment of double damages on account of failure to pay within thirty days after notice. Carriers by rail are, in the operation of trains, engaged in a work which is hazardous to stock running at large, but are only responsible for damage to stock when the damage is caused by negligence of their servants. It is a matter of common knowledge that in this State, where a considerable portion of the lands are unfenced and afford free range for live stock, it is customary to permit stock to run at large. It is, therefore, no unreasonable burden to require carriers, in cases where they are legally responsible for damage done to stock in the operation of trains, to pay the

damages within a reasonable time prescribed by law. Frequently the injury to live stock occurs at obscure places on the railroad when the trainmen are the only witnesses, and the evidence of negligence or non-negligence lies exclusively with them. The company, when notified of the damage, can readily investigate and ascertain whether or not it is responsible for the damage, and it is no hardship to require this to be done promptly. Thirty days, the time prescribed by this statute within which the railroad company is required to pay, is reasonable, for it affords sufficient time for investigation of a claim for damages before being required to pay."

This construction of the statute by the State court places it squarely within the doctrine announced in the Seegers case.

In Minneapolis & St. Louis Railway Co. v. Beckwith, 129 U. S., 26, this court had under consideration a statute of Iowa imposing an absolute liability on railroads for injury to live stock at points where no fences were maintained, and imposing a double liability for failure to pay within thirty days. This statute was held not to be in violation of the Fourteenth Amendment to the constitution, although the double damages were only assessed for failing to pay within thirty days, and not for failure to fence the right of way, the court stating (p. 34):

"There must be, not merely negligence of the company in not providing guards against accidents of the kind, but also its refusal to respond for the actual damages suffered."

Under the Arkansas statute there can be no recovery unless the company is negligent, but in order

to justify a recovery of the double damages there must be, not only negligence in killing the stock, but also a refusal to respond for the actual damages suffered. In both cases there must be negligence concurring with a failure to pay, and in each case the company might deny liability, go to trial, and upon an adverse verdict be made to pay the penalty. In a suit under the Iowa statute the company might plead that the right of way was fenced or that no damage was suffered by plaintiff, and in a suit under the Arkansas statute the company might plead that there was no negligence on its part, or that no injury was suffered; and in both cases the pleas might be made in good faith, and yet the penalty would be assessed upon the recovery of a judgment against the defendant. The only difference in this respect in the two statutes is that the Arkansas statute provides that there shall be no penalty unless the owner recovers the amount he sues for, while there is no such provision in the Iowa statute. There being no material difference in principle in the two statutes, it is hard to conceive upon what theory the Iowa statute can be upheld and the Arkansas statute declared unconstitutional.

The case of Atchison, Topeka & Santa Fe Railroad Company v. Matthews, 174 U. S., 96, is very much like the case at bar in principle. There a statute of Kansas provided that proof that a fire was caused by the operation of a railroad should be *prima facie*

evidence of negligence of the company, and upon recovery of a judgment against the company a reasonable attorney's fee should be allowed the plaintiff. There was no provision in the statute requiring the plaintiff to give the company thirty days notice, and no provision that if the plaintiff should recover less than the amount demanded in his complaint he should forfeit the attorney's fees; and yet the statute was upheld as a valid exercise of the police powers of the State. In the case of the Arkansas statute under consideration, proof of the killing of live stock is *prima facie* evidence of negligence, but the penalty is not imposed unless the company fails to investigate and pay the damages promptly. In what respect can the police powers of a State differ in regulating the operation of trains with regard to the danger of fires along the right of way, and to the danger of collisions with animals on the track? Certainly it is as much to the interest of the public to prevent collisions as it is to prevent fires. As was said by this court in the Beckwith case (129 U. S., 26, 33), "The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers."

In Fidelity Mutual Life Association v. Mettler, 185 U. S., 308, this court upheld a statute of Texas imposing a penalty of 12 per cent and attorney's fees upon a life or health insurance company which fails to pay a loss within the time specified in the policy. If that act is constitutional, it would certainly seem proper to allow a recovery against a railroad for negligently killing or injuring live stock and failing to investigate and adjust the matter within thirty days.

In the case at bar the State court held that thirty days was a reasonable time to allow the company in which to investigate and pay the damages, and this court, in the case of Minneapolis & St. Louis Railway Co. v. Beckwith, *supra,* sustained a statute allowing the railroad the same time.

That the penalty provided in the statute in question is not so heavy as to deter the railroad company from contesting a claim, and thus denying to it the equal protection of the law, is shown by the following citations: Missouri Pacific Railway Co. v. Humes, 115 U. S., 512, where the penalty was double the amount of damage done; Minneapolis & St. Louis Railway Co. v. Beckwith, 129 U. S., 26, where the penalty was for double the value of the stock killed or injured; and Seaboard Air Line v. Seegers, 207 U. S., 73, where the penalty was for many times the amount of the damage. In the Beckwith case, Mr. Justice Field, who delivered the opinion of the court, said, in

speaking of the double damages allowed (129 U. S., 35): "Without the additional amount allowed there would be few instances of prosecutions of railroad companies where the value of the animals killed or injured by them is small, as in this case; the cost of the proceeding would only augment the loss of the injured party."

Plaintiff in error, in its brief in the State Supreme Court, relied almost exclusively on the case of Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S., 150, but that case is not in point, for there this court followed the interpretation placed on the statute by the Supreme Court of Texas that the statute was designed to compel railroads to pay their small debts, and for this purpose this court held that railroads were not proper subjects of classification.

Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U. S., 96.

In the Matthews case this court indicated that if the Texas statute, declared unconstitutional in the Ellis case, had been confined to suits for killing stock, as in the case at bar, the assessment of the attorney's fee would have been constitutional. The court said (p. 100): "So that, according to the interpretation placed upon the Texas statute by its Supreme Court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not

sufficient to justfy us in separating the statute into fragments and upholding one part on a theory inconsistent with the policy of the State."

In the case of Seaboard Air Line v. Seegers, 207 U. S., 73, this court upheld a statute requiring a railroad company to pay a penalty for failing to pay for loss or damage to freight within forty days, although the statute declared unconstitutional in the Ellis case had a simiar provision, the distinction being that in one case the object was to compel the payment of numerous small debts, and in the other it was to compel a prompt investigation and adjustment.

The case at bar falls within the rule announced in the Seegers, Mettler and Matthews cases, and not within the rule of the Ellis case.

That the railroads are proper subjects of classification with respect to the matters contained in the statute attacked in this case, in addition to the above authorities, we refer the court to the following cases:

Missouri Pac. Ry. Co. v. Humes, 115 U. S., 512.

Missouri Pac. Ry. Co. v. Mackey, 127 U. S., 205.

St. Louis, I. M. & S. Ry. Co. v. Paul, 173 U. S., 404.

Farmers, etc., Ins. Co. v. Dobney, 189 U. S., 301.

Missouri, Kan. & Tex. Ry. Co. v. May, 194 U. S., 267.

We submit that the judgment of the Supreme Court of Arkansas should be affirmed.

R. E. WILEY,
POWELL CLAYTON,
Attorneys for Defendant in Error.